Supreme Court, U.S.
FILED
DEC 9 1992
OFFICE OF THE CLERK

92-984

No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE DAILY GAZETTE COMPANY, INC.,
Petitioner,

v.

RAYMOND A. HINERMAN,
Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR WRIT OF CERTIORARI

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December 9, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

In *Masson v. New Yorker Magazine, Inc.*, this Court confirmed that the constitutional actual malice requirement articulated in *New York Times Co. v. Sullivan* incorporates the "historical understanding" of the common law of libel that "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " 111 S. Ct. 2419, 2432-33 (1991) (citations omitted). This case presents two interrelated questions concerning the constitutional requirement that a libel plaintiff in an "actual malice" libel case establish the substantial falsity of the statements of which he complains:

1. Does the First Amendment require an appellate court hearing an "actual malice" libel case to conduct an independent review of the record to determine not only whether the plaintiff has borne his constitutional burden of establishing actual malice, but also to determine whether he has borne his constitutional burden of proving the challenged statements substantially false?

2. Does the First Amendment require that falsity, like "actual malice," be established by clear and convincing evidence?

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PETITION FOR WRIT OF CERTIORARI

The Daily Gazette Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Appeals of West Virginia is, as yet, unreported. Justice Neely's opinion for the three-justice majority is reprinted in

the Appendix ("App.") hereto at 1a-48a.[1] Justice Miller's opinion for the two dissenting justices is reprinted in the Appendix at 49a-75a.

JURISDICTION

The judgment of the Supreme Court of Appeals of West Virginia was entered on July 15, 1992. App. 1a. The Supreme Court of Appeals of West Virginia denied The Daily Gazette Company's petition for rehearing on September 11, 1992. App. 78a. This Petition for Certiorari is filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution:

   "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

2. The Fourteenth Amendment, Section 1, to the United States Constitution:

   "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of the law . . . ."

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[1] The majority opinion incorrectly identified the trial court judge as the Honorable Callie Tsapis. The case was tried before Judge Larry V. Starcher. Judge Tsapis entered the default judgment criticized in the editorial out of which this libel action arises.

STATEMENT OF THE CASE

1. Factual and Procedural Background

Petitioner, the Daily Gazette Company, Inc. ("the Gazette"), publishes the *Charleston Gazette*, a daily newspaper in Charleston, West Virginia.[2] Respondent, Ray Hinerman ("Hinerman"), is a lawyer and former Vice President of the Board of Governors of the West Virginia State Bar, a body that advises the Supreme Court of Appeals of West Virginia ("West Virginia Supreme Court"). At all times relevant to this suit Hinerman served on the Board of Governors, was the municipal judge for the City of Weirton, and served on the West Virginia Racing Commission.

On May 3, 1983 Sam Levin ("Levin"), a disabled immigrant coal miner, petitioned the West Virginia Supreme Court asking for dismissal of a default judgment entered against him in a fee dispute with Hinerman, who had represented him on a Worker's Compensation claim. According to the petition, the default judgment had been granted because the *pro se* attempts of Levin, "a Russian immigrant with a limited understanding of the English language and with absolutely no legal background," failed to comply with court rules. R. 88, 93.

As a result, the petition stated, Hinerman would receive approximately $12,000 of Levin's disability benefits for a one-day court appearance. R. 95-96. The petition stated that Judge Callie Tsapis had ordered the "attachment of 100% of [Levin's] Workmen's

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[2] Pursuant to Rule 29.1, the Daily Gazette Company states that it has neither a parent company nor any nonwholly owned subsidiaries.

Compensation benefits in favor of [Hinerman]." R. 85.

On May 17, 1983, the West Virginia Supreme Court agreed to hear Levin's appeal, and United Press International ("UPI") released a report on the dispute describing Hinerman's attachment of "100 percent of the disability claim." App. 79a. The next day the Charleston *Daily Mail* ran an Associated Press story stating that Levin had "gained a state Supreme Court hearing of his claim that he was awarded $12,000 in Workers' Compensation benefits only to have his lawyer take the entire amount for handling the case." App. 80a-81a.

The Gazette also ran an article that day. The article was based on the UPI story and the petition. The article stated that the order imposed by Judge Tsapis allowed Hinerman to "take 100% of Levin's monthly Workers' Compensation benefits until his fees are paid." App. 82a-84a. Of the three news stories on Levin's petition, only the Gazette story reported the detail that the attachment of benefits was to last only until the fee was paid. The accuracy of this article never has been challenged.

On May 20, 1983, the Gazette published an editorial entitled "Lawyer Ethics" suggesting that the State Bar ethics committee keep an eye on Levin's case in the West Virginia Supreme Court.[3] The editorial was based on the earlier Gazette story.

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[3] The West Virginia Supreme Court ultimately affirmed Judge Tsapis' entry of the default judgment in favor of attorney Hinerman in an opinion authored by Justice Richard Neely. *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983).

The editorial criticized Hinerman's treatment of Levin and stated that although the case had not been decided, "it implies that another helpless client has suffered at the hands of a lawyer." App. 86a. The editorial said that Hinerman would receive $12,000 for a single day's work, but failed to note that once the $12,000 was paid, the attachment on Levin's Worker's Compensation benefits would be removed.

On April 23, 1984, Hinerman sued the Gazette claiming that the editorial libeled him by imputing "improper or immoral" conduct to him. R. 4. On October 4, 1990 a jury in Brooke County, West Virginia awarded Hinerman $75,000 in compensatory damages and $300,000 in punitive damages.[4] App. 76a-77a. The Gazette appealed the judgment to the West Virginia Supreme Court, stressing the obligation of the court to conduct an independent review of the record and

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[4] The Gazette objected to the trial court's jury instructions on punitive damages and properly challenged the punitive damage award in the West Virginia Supreme Court. Relying on its decision in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-479), the West Virginia Supreme Court rejected the Gazette's argument that the imposition of punitive damages violated its due process rights.

According to Justice Neely, the award of punitive damages was justified because the Gazette's "failure to retract its statement, its failure to offer an apology, and its failure to offer amends in any way for its defamatory statement" relegated the Gazette to the category of "really mean" defendants. App. 35a-37a. Indeed, the court announced a *per se* requirement that to avoid being deemed "really mean"—and thus subject to virtually limitless punitive damages under *TXO*—a future libel defendant in West Virginia must "extend a prompt, prominent and abject apology along with a prompt offer of reasonable damages . . . ." App. 42a.

asking the court to reverse the judgment on the ground, *inter alia*, that Hinerman had failed to prove falsity by clear and convincing evidence.[5]

2. The Decision Below

On July 15, 1992, Justice Richard Neely, writing for a three-justice majority of the West Virginia Supreme Court, affirmed the judgment of the trial court. Based on his view that this Court's recent libel decisions are "mere genuflections [to precedent] as each year the Court moves farther away from the broad holdings of *New York Times v. Sullivan* and *Gertz v. Robert Welsh, Inc.*," App. 22a n.17, Justice Neely failed to conduct any independent review on the issue of falsity.[6]

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[5] On appeal, the Gazette stressed the duty of the West Virginia Supreme Court to conduct an independent review of the record to determine whether, as a matter of constitutional law, the editorial was libelous. Appellant's Br. at 20-22. In addition, the Gazette specifically argued that the editorial was not substantially false under the standard explicated in this Court's decision in *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), and that the required falsity had to be proved with convincing clarity. Appellant's Br. at 19-20 n.3, 33-42.

The falsity and burden of proof issues also were raised in the Gazette's motion for judgment notwithstanding the verdict, R. 248, 250-52, and in the Gazette's requested jury instructions. R. 148, 173-77. Additionally, the burden of proof issue was raised in the Gazette's objections to the jury instructions, R. 243-44, which were timely filed in accordance with the procedure followed by the trial court. *See* Tr. Oct. 4, 1990 at 2-4.

[6] Justice Neely based his conclusion that this Court has retreated from the protection of speech on his interpretation of the significance of this Court's denial of certiorari in a number of recent libel cases. App. 22a n.17. Not only does Justice Neely's attempt to divine meaning from this Court's denials of

Instead, the majority bypassed the threshold question of falsity without analysis. After providing a lengthy commentary on the supposedly diminished stature of the contemporary press, App. 25a-29a, Justice Neely's majority opinion held that the Gazette had acted with actual malice.[7] App. 30a-33a.

The two dissenters—the only members of the court to engage in the requisite independent review of falsity—found the editorial was not substantially false and would have set aside the jury verdict. App. 49a, 55a-57a, 74a-75a.

Justice Miller opened the dissenting opinion with a sharp criticism of the Neely majority's intentional disregard of the substantial accuracy of the challenged editorial and the venomously anti-press tone of its opinion:

> In my more than thirty-five years as a trial lawyer and as a judge on this Court, I have never seen a major case so badly botched. It contains a virtual Augean stables' worth of error and surplusage. These errors range from irrelevant denigrations of the *Gazette* to important omissions, *e.g.*, the majority's failure to quote the *Gazette*'s newspaper ar-

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certiorari violate the Court's fundamental view that "[t]he denial of a writ of certiorari imports no expression upon the merits of the case," *United States v. Carver*, 260 U.S. 482, 490 (1923), but, as Justice Miller pointed out in dissent, the vast majority of the cases cited by Justice Neely involved judgments in favor of the libel defendant and only one of the cases involved a final judgment against a defendant. App. 68a-69a nn.16-17.

[7] Hinerman had been required to prove actual malice not only because he was a public official, but also because he sought an award of punitive damages.

> ticle. This article was admitted by the parties to be accurate, and it was the basis for the editorial at issue. The reason for this omission is obvious. If the two documents are compared, as is required by the First Amendment, there can be no finding of any substantial inaccuracy.

App. 49a.

The dissenters also noted that although Hinerman was undoubtedly a public official, the fact that the editorial was substantially true would have compelled a verdict for the Gazette even if Hinerman had been a purely private figure:

> [T]his entire libel rests upon the omission of a single phrase, "until the [fee] bill was paid," in the *Gazette*'s editorial that otherwise accurately set out the facts contained in its news article. There is no question that the news article and the editorial stated Hinerman's attachment took 100 percent of Levin's compensation payments. Thus, while the attachment existed, Levin did not receive one penny of his compensation award. While lawyers may quibble over how long this period of no payments would last for Mr. Levin, common sense would compel the conclusion that during this period, Mr. Levin received nothing. This was the obvious meaning of the editorial. It was not false in any material regard, and, as a consequence, Mr. Hinerman, even as a private citizen, is not entitled to recover . . . .

App. 74a-75a.

Warning that Justice Neely's opinion "exposes every media organization in the State to its pernicious

reasoning," Justice Miller invoked review by this Court as the last chance to avoid the significant harms the decision would impose on the West Virginia press: "I can only conclude that the significant errors contained in the majority opinion may be rectified in a further appeal to the United States Supreme Court." App. 75a.

REASONS FOR GRANTING THE WRIT

1. CERTIORARI SHOULD BE GRANTED TO RESOLVE IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW THAT BEAR ON ALL "ACTUAL MALICE" LIBEL CASES: THE BURDEN OF PROOF AND THE STANDARD OF APPELLATE REVIEW THAT APPLY TO THE PLAINTIFF'S CONSTITUTIONAL OBLIGATION TO PROVE FALSITY.

Under the decisions of this Court, actionable defamation is one of the few narrowly drawn categories of communications "to which the majestic protection of the First Amendment does not extend . . . ." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 504 (1984).

Even when the Constitution permits the states to regulate speech because it falls within an "unprotected" category, appellate courts must engage in *de novo* review of trial court records to ensure that protected speech is not improperly punished:

> [I]ndependent review of the record [is necessary] both to be sure that the speech in question actually falls within the unprotected category and to confine the perimeters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be inhibited.

Id. at 505. This requirement of independent appellate review is "a rule of federal constitutional law." *Id.* at 510.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964), this Court discussed the application of the requirement of independent appellate review: whenever a line is drawn between unconditionally protected speech and speech that may legitimately be regulated, an appellate court must examine for itself " 'the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect.' " *Id.* at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)).

Although the Court in *New York Times* squarely held that any finding of "actual malice" must be subjected to independent appellate review, it was not called upon to decide whether such judicial oversight also is required in connection with the predicate finding of falsity. This case affords the Court the opportunity to make clear that, as a matter of federal constitutional law, an appellate court reviewing a libel decision must conduct an independent review of the record to determine whether the plaintiff has proved by clear and convincing evidence that the challenged statements were substantially false.

The majority in the West Virginia Supreme Court ignored this principle of federal constitutional law and simply accepted the jury's determination on this key issue of constitutional fact. The majority's error was compounded by the fact that the trial court permitted the jury to find falsity by a mere preponderance of the evidence—despite the Gazette's request that the

jury be instructed that falsity must be proved with convincing clarity.

The two dissenting justices in the West Virginia Supreme Court—the only judges who did conduct the constitutionally mandated independent appellate review—found the challenged editorial substantially true and therefore protected under the First Amendment.

This case presents issues of profound national significance that arise in every "actual malice" libel case in which the accuracy of the publication is disputed. If these issues are left unresolved by this Court, conflicts among the lower courts—which have already arisen and led to disparate results—will continue to ensure that speech constitutionally protected in one jurisdiction will be left unprotected in another. The problem is not theoretical; as noted below, significant splits of authority already exist on the issues of the burden of proof and the standard of appellate review applicable to falsity. *See* below at 17-21.

a. Defamatory Speech Must Be Proved Substantially False Before It Can Support an Award of Damages.

As this Court recognized in *Bose*, the categories of communication that fall outside the protections of the First Amendment may be regulated only because " 'any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.' " 466 U.S. at 504 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)). The court recently reconfirmed that the only state interest that justifies the intrusion on free speech that necessarily attends any libel action " 'is the compensation of individuals for the harm inflicted on them by defama-

tory falsehood.'" *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. at 2432. *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

Since "state remedies for defamatory falsehood [may] reach no farther than is necessary to protect the legitimate interest involved," *Gertz*, 418 U.S. at 349, even speech that is inaccurate may not constitutionally support an award of damages under state defamation law unless the inaccuracy itself carries the requisite reputational harm. Thus, a publication such as the editorial at issue in this case, which conveyed an essentially truthful message, is not actionable as a matter of federal constitutional law.

This Court first alluded to the substantial falsity requirement nearly thirty years ago in *New York Times* when it compared the published statements at issue in that case with the undisputed truth and suggested that the disparity between the two might be constitutionally insufficient to remove the speech from the protections of the First Amendment. "The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems . . . ." 376 U.S. at 289. Last year, in *Masson*, this Court again pointed to the constitutional dimension of the falsity requirement: "Our definition of actual malice relies upon [the] historical understanding [that minor inaccuracies do not amount to falsity]." *See* 111 S. Ct. at 2433.

The actual malice rule requires proof that the defendant published the challenged statement either "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* 376 U.S. at 279-80. As suggested in *Masson*,

this requirement is not met unless the falsity known of or recklessly disregarded by the defendant is substantial. There must be some falsity that "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *See Masson*, 111 S. Ct. at 2433.

Statements that are not substantially false may not constitutionally support an award of damages under state defamation law because they do not have a meaningful impact on the underlying state interest in protecting reputation. *Cf. New York Times*, 376 U.S. at 289; *Masson*, 111 S. Ct. at 2432-33.

b. The Supreme Court of Appeals of West Virginia Ignored Its Constitutional Obligation to Conduct an Independent Review of the Record to Ensure that the Editorial was Substantially False.

Because the question of falsity in a libel action "is one of alleged trespass across 'the line between speech unconditionally guaranteed and speech which may legitimately be regulated,' " the constitutional requirement of independent appellate review applies to this element of a libel suit. *See New York Times*, 376 U.S. at 285 (quoting *Speiser v. Randall*, 357 U.S. 513, 525 (1958)). *See also Bose*, 466 U.S. at 504-09.

As this Court explained in *Bose*, the rule of independent appellate review applies both to ensure that free speech is not impermissibly punished in individual cases and to guarantee that the unprotected category of speech is properly limited. "Providing triers of fact with a general description of the type of communication whose content is unworthy of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that de-

cisions by triers of fact may inhibit the expression of protected ideas." 466 U.S. at 505.

The Neely majority ignored completely its obligation to ensure that the jury's verdict in this case did not constitute an unconstitutional violation of the Gazette's rights as a First Amendment speaker. Rather than independently determining whether the record could support a finding of substantial falsity, the majority simply accepted the jury verdict without analysis, excusing its failure to engage in independent review with the unsubstantiated assertion that "the standard of [independent appellate] review has become less stringent than *New York Times* at first appeared to require." App. 21a.

In so doing, the West Virginia Supreme Court delegated to the jury a duty that it had a constitutional obligation to perform itself: "the rule of independent review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact, whether the factfinding function be performed in the particular case by a jury or by a trial judge." *Bose*, 466 U.S. at 501.

c. The Jury Was Improperly Instructed that the Plaintiff in an "Actual Malice" Libel Case Need Only Prove Falsity By a Preponderance of the Evidence.

The West Virginia Supreme Court's error in failing to conduct independent review of the record for evidence of falsity is magnified by the fact that the jury had been improperly instructed as to plaintiff's burden of proof on that element of his case. Thus, the court not only failed to ensure that the plaintiff had established the substantial falsity of the editorial, but

it adopted a finding of constitutional fact that had been made under a defective jury instruction.

Any plaintiff who is a public official or public figure or who seeks presumed or punitive damages from a media defendant bears the burden of proving *with convincing clarity* that the challenged publication was made with actual malice, that is, that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times* 376 U.S. at 279-80, 285-86. Nonetheless, the trial court in this case allowed the jury to decide the predicate issue of falsity under the less stringent preponderance of the evidence standard.

Thus, although the jurors were instructed that they could not impose liability unless they were clearly convinced that the Gazette either knew that its publication was false or had entertained serious doubts as to its falsity, the jurors, paradoxically, also were told that they could impose liability on the Gazette even if they were not clearly convinced that the Gazette's publication was in fact false. Such an anomalous instruction not only confounds logic and First Amendment philosophy, but creates a profound danger of jury confusion and error.

The actual malice rule is designed to serve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," and is predicated on the understanding that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need *** to survive' . . . ." *New York Times*, 376 U.S. at 270-72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). And falsity, of course, lies at

the core of any actionable defamation. No matter how unpopular or offensive speech may be, it is actionable only if it is demonstrably false. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) ("To ensure that true speech on matters of public concern is not deterred," the First Amendment requires even private figure libel plaintiffs to establish the falsity of the statements they challenge.); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned.").

As this Court recognized in *Gertz*, the constitutional imperative to protect the free flow of ideas sometimes requires the courts to protect even demonstrably false speech: "The First Amendment requires that we protect some falsehood in order to protect speech that matters." 418 U.S. at 341. Permitting the jury in an actual malice case to impose liability where it is not firmly convinced even that a false statement has been made violates the First Amendment principles underlying *Sullivan* and its progeny. Application of the convincing clarity standard to the fact finder's falsity determination is constitutionally mandated to ensure the necessary "breathing space" for speech on public issues.

The West Virginia Supreme Court failed to conduct independent appellate review on the issue of substantial falsity. It failed to do so even though the jury had been improperly instructed as to the burden of proof on that element.[8] As discussed previously, in-

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[8] Although the West Virginia Supreme Court failed to conduct an independent review of the jury's finding on falsity, and thus

dependent appellate review of the falsity determination is necessary because, even when juries are instructed correctly on the applicable constitutional standard, independent review is required to "eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas." *Bose*, 466 U.S. at 505. Where, as here, the triers of fact have not been properly instructed in the first instance, the need for full independent appellate review is even more pronounced.

This Court should grant the requested writ of certiorari to resolve whether, in an "actual malice" libel case, independent appellate review is required to ensure that the plaintiff has met his constitutional burden of proving substantial falsity by clear and convincing evidence.

2. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS AS TO WHETHER INDEPENDENT APPELLATE REVIEW IS CONSTITUTIONALLY REQUIRED ON THE ISSUE OF FALSITY IN "ACTUAL MALICE" LIBEL CASES.

The Court should grant review in this case to resolve a split in authority on the question of whether independent appellate review is required on the issue of falsity in an actual malice libel case. By its decision,

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had no occasion to rule on the applicable burden of proof, the court nevertheless paid lip service to the clear and convincing evidence standard in the body of its opinion. App. 21a. However, the court omitted the words "clear and convincing evidence" when it stated its official holding in the precedentially binding syllabus to its opinion. App. 2a (syllabus point 1). *See Summers County Citizens League, Inc. v. Tassos*, 179 W. Va. 261, 266, 367 S.E.2d 209, 214 (1988) (the controlling points of law are revealed by considering the syllabus points in light of the facts contained in the body of the opinion).

the West Virginia Supreme Court has indicated its belief that it is not required to conduct an independent appellate review of the substantial falsity issue in defamation cases.

The approach of the West Virginia Supreme Court in this case conflicts with the holding of the United States Court of Appeals for the District of Columbia Circuit in *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825 (1988). In that case the court ruled that "where the constitutional prerequisites of falsity and actual malice are at issue 'an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the filed (sic) of free expression." ' " *Id.* at 1293 (quoting *Bose* at 466 U.S. at 499 (quoting *New York Times*, 376 U.S. at 284-86)).

The West Virginia Supreme Court's position also conflicts with recent decisions of the Michigan Supreme Court holding that independent appellate review is required on the issue of substantial falsity in private-figure, public interest cases. *See Rouch v. Enquirer & News of Battle Creek*, 440 Mich. 238, 487 N.W.2d 205, *cert. denied*, 112 S. Ct. 1267 (1992) (United States Supreme Court precedent requires an appellate court to "independently review the whole record . . . to consider whether material falsity was shown"); *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112 (1991) (the First Amendment requires "independent appellate review of the burden of proof with regard to falsity in private-figure, public-interest cases [to deter] 'forbidden intrusion on the field of free expression' ") (quoting *New York Times*,

376 U.S. at 285). *See also Medical Mutual Liability Ins. Soc'y v. B. Dixon Evander & Assocs.*, 92 Md. App. 551, 609 A.2d 353 (1992) (Under *Bose* "[a]n appellate court must conduct an independent *de novo* review of the evidence to determine if falsity and actual malice are clearly and convincingly established."). *But see Bressler v. Fortune Magazine*, 971 F.2d 1226, 1242 (6th Cir. 1992) (Batchelder, J., dissenting).

The Court should grant the requested writ of certiorari to resolve the conflict on this important question of constitutional law.

3. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS REGARDING THE CONSTITUTIONAL BURDEN OF PROOF ON THE ISSUE OF FALSITY IN "ACTUAL MALICE" LIBEL CASES.

This Court explicitly has reserved the question of the proper standard of proof on the element of falsity in an "actual malice" libel case. *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2682 n.2 (1989) ("There is some debate as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. . . . We express no view on this issue."). The Court should grant the requested writ in this case to resolve the increasingly pronounced split of authority on this vital issue.

This conflict exists in both the federal courts of appeals and among the state courts. The Courts of Appeals for the Second and Third Circuits have adopted the convincing clarity standard for the element of falsity in actual malice libel cases. *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 272 (3rd

Cir. 1980) ("[Plaintiff] is required by well-settled constitutional principles to prove, with convincing clarity, that the defendants broadcast false statements, knowing of their falsity or with reckless disregard of the truth."); *Buckley v. Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976) (Plaintiff required to demonstrate "with convincing clarity not only that the [defendant's] statements were false, but that [defendant] knew they were false or made them with reckless disregard of their truth or falsity."), *cert. denied*, 429 U.S. 1062 (1977). *Accord Sharon v. Time, Inc.*, 599 F. Supp. 538, 558 (S.D.N.Y. 1984). *See also Firestone v. Time, Inc.*, 460 F.2d 712, 723 (5th Cir.) (Bell, J., specially concurring) *cert. denied*, 409 U.S. 875 (1972).

The District of Columbia Circuit, however, requires only that falsity be proved by a preponderance of the evidence. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1295-96 (D.C. Cir. 1988) (applying the "fair preponderance of the evidence" standard in a public figure libel case). *Accord Liberty Lobby, Inc. v. Rees*, 852 F.2d 595, 598 (D.C. Cir. 1988), *cert. denied*, 489 U.S. 1010 (1989); *In re United Press Int'l*, 106 B.R. 323, 327 n.10 (D.D.C. 1989). *See also Bressler*, 971 F.2d at 1242 (Batchelder, J., dissenting) ("I conclude that the district court did not err by instructing the jury that falsity may be proved by a preponderance of the evidence."); *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1049, *reh'g denied*, 397 U.S. 978 (1970), *overruled by implication, Buckley v. Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976).

The Ninth Circuit has recognized the split, but has not yet been required to reach the issue. *See Newton*

v. National Broadcasting Co., 930 F.2d 662, 669 n.7 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 192 (1991).

State courts are similarly split. Courts in Delaware, Maryland and Missouri have adopted the convincing clarity standard. *Batson v. Shiflett*, 325 Md. 684, 722, 602 A.2d 1191, 1210 (1992) ("The First Amendment to the United States Constitution requires that before a public figure may recover for defamation, clear and convincing evidence must establish that the statements in issue were . . . false . . . ."); *Ramada Inns, Inc. v. Dow Jones & Co.*, 543 A.2d 313, 319 (Del. Super Ct. 1987); *Medical Mutual Liability Ins. Soc'y*, 92 Md. App. at 570-71, 609 A.2d at 362; *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45, 49 (Mo. Ct. App. 1973).

The Florida Supreme Court, on the other hand, specifically has approved the preponderance of the evidence standard. *In re Standard Jury Instructions*, 575 So.2d 194, 196, 200 (Fla. 1991) (per curiam). The Nevada Supreme Court, while taking no position on the issue, has noted the split. *Nevada Indep. Broadcasting Corp. v. Allen*, 664 P.2d 337, 343 n.5 (Nev. 1983).

The Court should grant the requested writ of certiorari to resolve the conflict of authority on this important question of constitutional law.

CONCLUSION

The Neely majority failed to conduct an independent review to determine whether the record contained clear and convincing evidence that the editorial was substantially false. The dissenting justices—the only members of the court to engage in the constitutionally

mandated independent review—found, without hesitation, that the editorial "was not false in any material regard." App. 75a.

Instead of digging into the record "to assure [itself] that the judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times*, 376 U.S. at 285, the majority treated the facts of this case as incidental to its greater purpose of expounding on the "sinister, self-serving forces at work in both the print and broadcast media." App. 27a. Based on Justice Neely's conclusion that "the standard of [independent appellate] review has become less stringent than *New York Times* at first appeared to require," App. 21a., the majority made this case a vehicle for reforming West Virginia libel law to conform to its view that this Court has a waning enthusiasm for the First Amendment.

This Court should grant certiorari in this case to resolve the unacceptable split in authority by making it clear that the First Amendment requires independent appellate review in "actual malice" libel cases to ensure that falsity has been proved by clear and convincing evidence. As this Court has noted, the requirement of independent appellate review "reflects a deeply held conviction that judges—and particularly Members of this Court—must exercise such review in

order to preserve the precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 510-11.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 1992 Term.

No. 20489

RAYMOND A. HINERMAN,
Plaintiff Below, Appellee

v.

THE DAILY GAZETTE COMPANY, INC.,
Defendant Below, Appellant

Appeal from the Circuit Court of Brooke County
Honorable Callie Tsapis, Judge
Civil Action No. 84-C-137

AFFIRMED

Submitted: June 2, 1992
Filed: July 15, 1992

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JUSTICE NEELY delivered the Opinion of the Court.

CHIEF JUSTICE McHUGH, deeming himself disqualified, did not participate in the consideration or decision of this case.

SENIOR JUSTICE CAPLAN participated in the decision of this case.

MILLER and BROTHERTON, J.J., dissent and reserve the right to file dissenting opinions.

SYLLABUS BY THE COURT

1. In order for a public official or a candidate for public office to recover in a libel action, the plaintiff must prove that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or *knew* that he was publishing the statement in reckless disregard of whether the statement was false.

2. Egregious deviation from generally accepted standards of journalism, partisanship, animus towards the subject of a libel, or "malicious" motives, standing alone, are not conclusive evidence of "actual malice" as that term is used in *New York Times v. Sullivan*, 376 U.S. 254 (1964); however, egregious deviation from generally accepted standards of journalism, partisanship, ill will towards the subject of a libel, and "malicious" motives may be considered by the jury as circumstantial evidence on the issue of whether the publisher of a libel had a subjective realization that what he was publishing was false or that he was behaving with reckless disregard of whether what he was publishing was false.

3. In libel cases involving public officials or candidates for public office there is no objective, reasonable person standard that holds everyone alike to a uniform level of due diligence or reasonable care.

4. In a libel case it is the obligation of a reviewing court to make an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can properly be imposed upon a media defendant. In determining whether the constitutional standard of actual malice has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the opportunity to observe the demeanor of the witnesses, the reviewing court must examine for itself the statements in issue and the circumstances under which they were made to determine whether those statements are of a character that the principles of the First Amendment protect.

5. "Evidence that a media defendant intentionally 'avoided' the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel." Syllabus Point 5, *Dixon v. Ogden*, ___ W. Va. ___, 416 S.E.2d 237 (1992).

6. The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported. However, not only must the report be accurate but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it. An example would be a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence or the use of a defamatory headline in a newspaper report, the qualification of which is found only in the text of the article.

The reporter is not privileged to make additions of his own that would convey a defamatory impression nor to impute corrupt motives to anyone, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.

7. Under the First Amendment to the *Constitution of the United States*, it is the obligation of the courts to protect the free flow of information and to encourage robust, unfettered debate; therefore, reviewing courts must be circumspect about sustaining large punitive damages awards against media defendants based upon the knowing, intentional, and spiteful conduct of employees; however, in the courts' efforts to promote free speech and discourage self-censorship, there can be no tolerance for media arrogance. Therefore, once a victim has been knowingly and intentionally libeled, a media defendant exacerbates its liability for punitive damages on every day that it fails to make a prompt, prominent and abject apology to rectify the harm that it has done.

8. Although a prompt, prominent and abject apology, combined with an offer of reasonable compensation will not shield a media defendant from paying appropriate actual damages, under Syllabus Point 3 of *Garnes v. Fleming Landfill*, 186 W. Va. 656, 413 S.E.2d 897, (1992), the trial court and this Court, in the process of independently examining all issues that were before the jury as required by *New York Times v. Sullivan*, 376 U.S. 254 (1964), may reduce punitive damages to zero in deference to free speech imperatives when actual damages are substantial and the offending media organization has made a prompt, prominent and abject apology along with an offer of reasonable compensation.

9. Jurisdiction implies or imports the power of the Court, venue the place of the action.

10. In defamation cases, three types of plaintiffs exist: (1) public officials and candidates for public office; (2) pub-

lic figures; and, (3) private individuals. Public officials are those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs; however, the public official category cannot be thought to include all public employees.

11. Although it is not necessary to identify a president, governor, U. S. senator, congressman, or other well-known public official as serving in a particular office, a private person who is a "public official" only by virtue of his holding a low-level government or quasi-government position, must be identified in his public capacity before a media defendant in a libel action may shield itself behind the special rules of the libel law that apply to public officials.

Neely, Justice:

This is a libel case against *The Charleston Gazette* in which the plaintiff, Raymond Hinerman, recovered $75,000 in actual damages and $300,000 in punitive damages. We affirm.

BACKGROUND

Sam Levin is a Russian immigrant who came to the United States in 1975 and moved to Wheeling in 1977. Mr. Levin was trained as a mining engineer in Russia and he found work in West Virginia as a miner. While working, Mr. Levin suffered a heart attack. Mr. Levin filed a Workers' Compensation claim and was represented by legal counsel for District 6 of The United Mine Workers (UMW) free of charge. At that time, the UMW's lawyer was Raymond Hinerman, the appellee in the case before us.

Mr. Levin's Workers' Compensation claim was contested on several grounds. There was some question concerning whether: (1) Mr. Levin had a preexisting heart condition; (2) the heart condition arose from and in the course of

Mr. Levin's employment; and (3) the condition produced permanent total disability. The initial determination was that a 20 percent award would fully compensate Mr. Levin for his work-related injury.

Mr. Levin protested the initial 20 percent award, and while his appeal was being processed, District 6 of the UMW replaced Raymond Hinerman with Craig Broadwater as their lawyer. Mr. Broadwater suggested to Mr. Levin that he retain Mr. Hinerman privately because of Mr. Hinerman's experience with complex Workers' Compensation cases.

Mr. Broadwater made clear to Mr. Levin that private representation by Mr. Hinerman would not be free, and in fact, Mr. Broadwater showed Mr. Levin a copy of the West Virginia statute on lawyers' fees in Workers' Compensation cases. Mr. Levin then requested the services of Mr. Hinerman as his private lawyer. There followed conversations and a signed, written contract setting forth the terms under which Mr. Hinerman agreed to act as Mr. Levin's lawyer. The contract into which the two parties entered was a standard contingent fee contract that called for Mr. Hinerman to receive 20 percent of all compensation awarded Mr. Levin for a period of 208 weeks. This was the maximum fee allowed by statute.

While the appeal of Mr. Levin's case to the Workers' Compensation Appeal Board was being prepared, Mr. Levin moved to Florida. Mr. Levin remained in constant communication with Mr. Hinerman through collect telephone calls to him. After Mr. Hinerman had presented his oral argument before the Workers' Compensation Appeal Board, the appeal board increased Mr. Levin's award to total permanent disability. Mr. Levin's employer did not appeal. On 8 June 1982, the commissioner directed payment to Mr. Levin of $19,782.38 in back benefits and a monthly stipend of $1,162.38.

Without informing Mr. Hinerman, Mr. Levin telephoned and sent a telegram to the Workers' Compensation commissioner revoking the commissioner's authority to honor Mr. Hinerman's demand for attorneys' fees. When Mr. Hinerman learned of this, he sent a letter demanding 20 percent of the award to date. After six weeks of repeated demands for payment pursuant to his contract, Mr. Hinerman sued Mr. Levin.

When Mr. Levin failed to answer, Mr. Hinerman moved for a default judgment, with notice to Mr. Levin that a hearing would be held on that motion on 14 October 1982. On 8 October 1982, the circuit court received a letter from David Gold, Esq., requesting a continuance and stating that he had just been contacted by Mr. Levin but had not yet agreed to act as counsel. At the 14 October 1982 hearing, Mr. Hinerman's motion was granted, but Mr. Levin was given an additional ten days to assert *bona fide* defenses. When Mr. Levin did not avail himself of that opportunity, a default judgment as to liability was entered on 27 October 1982. On 29 October 1982, Mr. Gold, who agreed finally to represent Mr. Levin, sent a letter to the Circuit Court of Hancock County seeking another continuance while he conferred with Mr. Levin's Florida counsel. Meanwhile, Mr. Hinerman gave notice to all the parties of a hearing set for 16 November 1982 for an attachment. On 4 November 1982, the clerk of the circuit court received a letter of general denial from Mr. Levin but neither the circuit judge nor Mr. Hinerman saw a copy of that letter. On 8 November 1982, Mr. Levin's counsel, Mr. Gold, advised the court by letter that he had not yet concluded arrangements with Mr. Levin concerning his employment. At the 16 November 1982 hearing, Mr. Levin's written motion to set aside the default judgment was delivered by another lawyer, Arch Riley, Jr., Esq., and the motion was denied by the circuit court. Finally, on 3 December 1982, Mr. Gold filed another motion to vacate the default judgment giving notice of a hearing to be held on

16 December 1982. On that date, the trial court conducted a full hearing and issued findings of fact and conclusions of law in a memorandum of opinion, and entered an order denying the motion.

Mr. Levin, through his lawyer Mr. Gold, then filed a petition in this Court appealing the 17 May 1983 circuit court order. The libelous editorial in *The Charleston Gazette* that is the subject of this appeal arose from the allegations in the petition filed by Mr. Gold. We granted Mr. Levin's appeal, and on 13 December 1983 entered an order affirming the circuit court in all matters except that we allowed Mr. Levin a $600 credit against his fee with Mr. Hinerman, based upon monies paid to Mr. Hinerman while Mr. Hinerman was employed by District 6 of the United Mine Workers. *See, Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983).

On 20 May 1983, *The Charleston Gazette* published the following editorial:

LAWYER ETHICS

> The State Bar ethics committee which guards against lawyer misconduct—and also the Judicial Inquiry Commission which watches over judges—should keep an eye on a current state Supreme Court case.
>
> It involves a sick immigrant miner who won disability payments, but his lawyer took every penny, getting $12,000 for one day's work. (The lawyer said the old man was lucky because $1,000 of the miner's legal expense was billed to a different client). A judge allowed it to happen because a letter from the immigrant didn't meet proper legal form.
>
> Allegations before the high court:
>
> Sam Levin, a Russia native, moved to Wheeling and worked for Consolidation Coal Co. until he suffered a heart attack. UMW attorney Ray Hinerman, paid by the union, represented Levin free before the

Workers' Compensation Fund. The miner was granted 20 percent disability.

Hinerman quit the UMW and represented Levin privately in an appeal. After a one-day hearing, Levin was granted 100 percent disability. Hinerman sent the ex-miner a bill for $4,202. Levin didn't pay. The lawyer sued in Hancock County Circuit Court, demanding $12,088.

Levin wrote a letter to Judge Callie Tsapis saying he couldn't afford to hire another lawyer to answer the suit, but felt he owed Hinerman nothing. "I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage." Ms. Tsapis ruled that the letter didn't constitute a legal reply. She gave Hinerman a default judgment and allowed him to seize 100 percent of Levin's Workers' Compensation benefits.

A different lawyer came to Levin's aid and appealed to the Supreme Court. The petition says Hinerman, incredibly, testified that he did the old miner a favor by billing $1,000 worth of Levin's expenses to another client.

The case hasn't been decided, but it implies that another helpless client has suffered at the hands of a lawyer. The legal ethics committee should monitor the case closely. Unfortunately, the committee usually won't act unless an official complaint is filed in proper legal form—and then the committee focuses on tedious technicalities rather than basic morality, right and wrong.

As for Judge Tsapis, nothing she might do would be surprising. She once hosted a party at which crooked lawyers under prison sentence or indictment were hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still,

the commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

THE FACTS SURROUNDING THE LIBEL

The 20 May 1983 *Gazette* editorial was written at the insistence of the late W. E. Chilton, III, then the *Gazette*'s publisher and chief executive officer, by James Haught, a senior *Gazette* employee. Mr. Hinerman sued *The Charleston Gazette* on the grounds that the editorial falsely asserted *as fact* that Mr. Hinerman took "every penny" of the Workers' Compensation benefits awarded to a former client, and omitted any reference to such balancing facts as were contained in the *Gazette*'s own news article on the subject (published a few days before the editorial) that would have disclosed that Mr. Levin had received a permanent total disability award rather than just $12,000, and that Mr. Levin's future benefits were subject to attachment only "until the bill [for fees] was paid."[1]

As part of Mr. Levin's fee arrangement with Mr. Hinerman, it was agreed that Mr. Levin would authorize Mr. Hinerman to receive Mr. Levin's checks so that Mr. Hinerman could deduct his fees as Mr. Levin was paid. Mr. Levin secretly revoked that authorization to avoid paying Mr. Hinerman the standard fee of 20 percent of the first 208 weeks worth of total permanent disability. Mr. Gold's petition on Mr. Levin's behalf in this Court contained a number of statements that represented an extreme of advocacy and, taken *selectively*, failed to convey the facts of the order that was appealed. Taken as a whole, however, the petition accurately related what the circuit court had ordered and, although the petition stated that "[t]he effect of this ruling is to give to the plaintiff, a practicing attorney, all of petitioner's income," it also re-

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[1] "Immigrant appeals lawyer's fee to court," *The Charleston Gazette*, 18 May 1983 (Defendant's Exhibit 19) (hereinafter *News Article*).

vealed that the lien against 100 percent of the benefits was to continue *only until the amount already overdue had been recovered.* The petition also made it clear that the judgment granted, and that Mr. Hinerman had sought, only 20 percent of 208 weeks of benefits plus costs.

The *Gazette* editorial not only misstated the facts, but failed even to report those aspects of the petition just related that would have given *some* balance to the editorial. Furthermore, the evidence at trial revealed that the editorial was run *only* at the insistence of the *Gazette*'s publisher, Mr. Chilton, who tightly controlled the paper's editorial policy.[2] Mr. Chilton had run numerous editorials critical of lawyers,[3] and Mr. Chilton expressly *required* Mr.

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[2] Direct examination of Mr. Haught by Mr. Waddell, attorney for Mr. Hinerman:

> Q: Were you the sole author of the editorial?
>
> A: Ned Chilton, the publisher, discussed it with me, but I did the writing.
>
> Q: As I understand it, back in May of 1983 Mr. Chilton, Ned Chilton, was the publisher of the Gazette; am I correct?
>
> A: Correct.
>
> Q: And he was your immediate boss—
>
> A: Right.
>
> Q: —for lack of a better word. And he was a dominating and forceful personality; was he not?
>
> A: Very forceful.
>
> Q: And he dictated the editorial page by the force of his will; did he not?
>
> A: Yes.

Transcript, 1 October 1990, at 106.

[3] Direct examination of Mr. Haught by Mr. Waddell:

> Q: Would you agree with me that one of the things Mr. Chilton

Haught to restate allegations the *Gazette* had made in another context concerning a link between Judge Callie Tsapis, the local circuit judge who had entered the order against Mr. Levin, and certain lawyers convicted in federal court of corruption in the Hancock County area.[4]

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had strong feelings about was lawyers and the legal profession?

A: Abuses by lawyers.

Q: He was generally negative with regard to lawyers and the legal profession; was he not?

A: He was touchy on the topic of corruption among lawyers, and we had just been through the Wally Baron scandals in which ten different lawyers went to prison, and he was very concerned about legal ethics, and had me write a series on legal ethics at one point.

Transcript, 1 October 1990, at 107.

[4] Direct examination of Mr. Haught by Mr. Waddell:

Q: Why is this last paragraph in the editorial about Judge Tsapis?

A: Because Ned had a special concern about her.

Q: Special dislike for her?

A: He was very upset that a judge hadn't been discharged for her involvement with the Altomare group and having a party, hosting for—actually it wasn't the party. It was for Altomare because he was a guest there and hailed and celebrated at that party, and he felt that was a wrongful position for a judge to be in.

Q: I see. Why put it in this editorial about Ray Hinerman's problems with Sam Levin?

A: Because she's the one who took Sam Levin's checks and gave them to Hinerman.

Q: Were you trying to suggest that she was doing a favor for Mr. Hinerman?

A: No.

Q: What were you trying to suggest by that?

A: Just that her actions were not necessarily always correct.

Q: What crooked lawyers do [sic] you have in mind when you

The evidence conclusively reveals, however, that Mr. Haught was aware that Mr. Hinerman had testified against the lawyer who led the group of corrupt lawyers in Hancock County, and that Mr. Hinerman had no connection *whatsoever* to any lawyer-related corruption in Hancock County.[5] Further, Mr. Haught was aware that Mr.

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wrote the editorial?

A: Altomare and the others who were convicted in that scandal.

Q: You weren't contending that Mr. Hinerman's a crooked lawyer, were you?

A: No.

Q: Would you agree with me that the average reader of this editorial reading that last paragraph would be under the impression that Ray Hinerman was somehow a crooked lawyer receiving a favor from Judge Tsapis?

A: That was not our intention at all, and I don't think that anybody would read it that way. At least I didn't mean it that way.

Q: You didn't personally write that last paragraph; did you?

A: I wrote it all, but Ned had personally made that point.

(. . .continued)

Q: Well, Ned instructed you to put that particular paragraph in; did he not?

A: Yeah. He didn't dictate the whole paragraph, he said, don't forget when she held that party in which everybody was cheering and applauding Altomare.

Transcript, 1 October 1990, at 122-123.

[5] Direct examination of Mr. Fred Risovich, II, (*see* note 9) by Mr. Waddell:

Q: [Mr. Haught] didn't make a statement to that effect that he felt it didn't sound like the Ray Hinerman that he knows or knew?

A: He did, and that was real significant to me at the time.

Q: Why was that?

A: Well, Ray Hinerman is the tupe [sic] of guy that if you're

Hinerman had not been at the party where the crooked lawyers were allegedly "hailed" as heroes by Judge Tsapis.[6] The editorial nevertheless discusses the supposed link between Judge Tsapis and crooked lawyers (implying, of course, a further link through Judge Tsapis between Mr. Hinerman and the crooked lawyers), and concludes by stating that the Judicial Inquiry Commission should "ask why [Judge Tsapis] allowed a lawyer to take all the public money granted to an impoverished ex-miner."

Mr. Haught sent a reporter to double-check the allegations against Mr. Hinerman contained in Mr. Levin's

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doing something illegal, unethical, he'll call you on it. And we had a prosecuting attorney in Hancock County named Mr. Altomare, and Mr. Altomare got indicted by a Federal Grand Jury.

No attorney wanted to go in and tell the truth about Mr. Altomare, and his reputation for truth. Mr. Hinerman went into Federal Court with the FBI and the United States Attorney and testified to the truth. Thereafter, the Charleston Gazette said—and I followed it closely at the time, little bits of information that Haught had written. Some of these articles and this information was coming from an attorney in Hancock County, and in the Bar—we have a small Bar Association. We all speculated it was Hinerman or Fahey, because Fahey had worked in Charleston and Hinerman knew a lot of people in the State. He was a past president of the Bar Association. And, so, when Haught said; I don't think that that's—it doesn't sound like the Ray Hinerman I know, it just—like a light went on. It's Ray who's been telling him. I know how honest Ray is, and they'll clear it up and it didn't happen. They never cleared it up.

Transcript, 1 October 1990, at 235-236.

[6] Direct examination of Mr. Haught by Mr. Waddell:

Q: Were you aware, were you not, that when you wrote the editorial that Mr. Hinerman wasn't even at the party held by Judge Tsapis; weren't you?

A: Oh, sure but nothing that's in there implies that.

Transcript, 1 October 1990, at 123.

petition in this Court.[7] Yet despite that "double-checking," Mr. Haught's editorial reported none of the facts apparent in the court file that would suggest that the innuendos concerning fraudulent, unethical and reprehensible conduct in the editorial inaccurate. Further, the editorial omitted a fact that had appeared in the *Gazette*'s own story, namely that the 100 percent levy of benefits was to continue "only until the [fee] bill was paid."[8]

Immediately after publication of the editorial, both Mr. Chilton and Mr. Haught received outraged calls from associates and acquaintances of Mr. Hinerman pointing out the inaccuracies in the *Gazette* editorial.[9] In his conver-

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[7] Direct examination of Mr. Fahey (*see* note 9) by Mr. Waddell, describing the conversation between Mr. Fahey and Mr. Haught on May 26, 1983:

> Q: During that conversation, did [Mr. Haught] indicate to you any doubt, that he had had any doubt concerning the truth of the allegations that were contained in this editorial prior to it being published?
>
> A: Yes. He had, again, told me that he knew of Ray Hinerman, knew that he wouldn't be involved in that. It must be a different Ray Hinerman. That as soon as he saw the story of what was alleged to have been filed in the Supreme Court, because Ray Hinerman's name was mentioned, he sent the reporter back to doublecheck his source and his information and tried to take those precautions *but did not intend to contact Mr. Hinerman or our office to see if there was any other position.* [Emphasis added]

Transcript, 2 October 1990, at 29-30.

[8] "Hinerman sued Levin for the fees last August and, after Levin neglected to answer the suit, received permission from Ohio County Circuit Judge Callie Tsapis to take 100 percent of Levin's monthly Worker's Compensation benefits *until his fees are paid.*" [Emphasis added] *News Article, supra* note 1.

[9] On 20 May 1983, the day the editorial was published, several members of Mr. Hinerman's law firm contacted the *Gazette*. William T. Fahey, Esq., one such lawyer, arranged for speaker-phone conversations with W. E. Chilton, III (publisher of the *Gazette*), as well as Mr. Haught.

sation with these people, Mr. Haught expressed surprise at the charges made against Mr. Hinerman and, at first, Mr. Haught was apologetic in tone.[10] In various conversations with associates of Mr. Hinerman, particularly William Fahey, Esq., Mr. Haught stated that the charges against Mr. Hinerman surprised him,[11] and he wondered whether those charges could relate to the same Ray Hinerman he knew, because that Ray Hinerman "wouldn't be involved" in something like that.[12] Mr. Haught repeated

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Michael Nogay, Esq., and Fred Risovich, II, Esq., as well as other members of the firm joined Mr. Fahey for at least part of the conversations.

[10] Mr. Nogay, reading from a memorandum he prepared at the time right after the article was published:

> Mike Nogay phoned [Jim Haught] and put him on the speaker with Bill Fahey present. Mr. Haught told Mike Nogay that 'I knew Ray Hinerman would not do something like this. In fact, I thought this was a different Ray Hinerman than the one in Weirton.' He was also very apologetic and said that the Gazette would print a retraction editorial on Monday.

Transcript, 1 October 1990, at 194.

[11] Direct Examination of Mr. Haught by Mr. Waddell:

> Q: Do you remember making a statement [to Mr. Fahey], that didn't sound like the Ray Hinerman that you know, or you thought it was another Ray Hinerman, something of that nature?
>
> A: Well, I never thought it was a different Ray Hinerman.
>
> Q: You thought you knew who you were writing about then; correct?
>
> A: Yes, and I was surprised to see that about him.

Transcript, 1 October 1990, at 122-123.

[12] Cross-examination of Mr. Fahey by Mr. DiTrapano, attorney for the *Gazette*:

> Q: Well, what is your best recollection as to what Mr. Haught told you about his relationship with Mr. Hinerman?
>
> A: I know Ray Hinerman, and the Ray Hinerman I know would not be involved in something like that, and that's why

similar statements to another Hinerman associate, Michael Nogay, Esq., to whom Mr. Haught also conceded that the paper "might have goofed."[13] However, Mr. Haught never admitted to these callers that he, in fact, was the author of the offending editorial.

Mr. Haught admitted at trial that he considered Mr. Hinerman trustworthy.[14] Mr. Haught also conceded that he expressly promised to print a retraction of the editorial.[15] Mr. Haught first requested that Mr. Hinerman write

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I sent the reporter back to doublecheck the record.

Transcript, 2 October 1990, at 97.

[13] Mr. Nogay reading the memo of conversation he had with Mr. Haught on 20 May 1983:

> I told Mr. Haught that due to ethical considerations he would have to refer to the reply that we would file in the Supreme Court on Monday for our version of the facts. Bill Fahey spoke with Mr. Haught and told him the same thing. Haught again sounded very apologetic over the speaker and it is my recollection that he said 'We might have goofed here.'

Transcript, 1 October 1990, at 194-195.

[14] Direct Examination of Mr. Haught by Mr. Waddell:

> Q: Mr. Haught, did you form an opinion as to Mr. Hinerman's reputation during the course of these conversations [during Mr. Haught's investigation of the Altomare scandal] with him?
>
> A: Well, I trusted him to be telling me the truth about the other side.
>
> Q: Did you consider him to be an honorable and straight forward [sic] individual at that time?
>
> A: As far as I knew.
>
> Q: You had no information to suggest otherwise; did you?
>
> A: No.

Transcript, 1 October 1990, at 104-105.

[15] Cross-examination of Mr. Haught by Mr. DiTrapano:

> Q: No. 1, you mentioned that you did have conversations with the lawyers who had called you and making inquiries about

a letter to the editor, but was told that doing so was prohibited by this Court's ethical rules governing lawyer-client relations.[16] Mr. Haught was, however, informed that a reply to the petition would be submitted to the Supreme Court on an expedited basis, and that Mr. Haught could examine that reply to ascertain Mr. Hinerman's position for purposes of a retraction. The expedited reply was filed on the Monday after the publication of the *Gazette*'s editorial.

The *Gazette* never printed a retraction. Two weeks after the publication of the initial defamatory editorial, the *Ga-*

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the story; is that correct?

A: I can remember at least one phone call from Bill Fahey. And he surprised me by immediately starting out that everything was wrong and that it was all false, all of the allegations in the Supreme Court case had been a distortion, and they were not true. And that confounded me some. I thought, uh-oh, good grief. If something's wrong, we'll correct it, and we'll get it straight, and we'll get it right, and we'll start going back and taking another look at that.

Transcript, 1 October 1990, at 165-166.

[16] Direct examination of Mr. Fahey by Mr. Waddell:

Q: When was your next conversation?

A: I believe it was the afternoon of the 20th. Mr. Haught indicated in the initial conversation that we may want to consider writing a letter to the editor and set forth our position with respect to the inaccuracies contained in the reports and in the editorial. We were of the opinion that that caused some ethical concern, because lawyers aren't supposed to try their cases in the newspapers. We phoned the West Virginia State Bar Ethics Council [sic] who, at that time, I believe was Bob Davis, and he reinforced our interpretation of the ethics of the situation, that we should not reduce ourselves to writing those type of letters, but that we should seek to file a response to the petition in the Supreme Court, and then any newspaper that wanted to cover the countervailing position would have the opportunity to go to official records to learn of our opposition.

Transcript, 2 October 1990, at 27.

zette published a second editorial on the matter, entitled "Another Look." The full text of the second editorial is as follows:

ANOTHER LOOK

Last month, when a petition to the state Supreme Court said a lawyer seized "100 percent" of the Workers' Compensation benefits of a "destitute" Russian immigrant coal miner, this newspaper urged the State Bar ethics committee to keep an eye on the case.

Later, however, the lawyer filed a special rebuttal saying the "alleged pauper" ex-miner pocketed more than $30,000 benefits, stood to gain perhaps $400,000 from the state fund, and employed a "deceitful plan" to avoid paying the lawyer's $12,088 of the bonanza.

Thus the case of Sam Levin, the immigrant who suffered a heart attack seven months after moving to Wheeling, and Weirton lawyer Ray Hinerman, who got a court order to seize Levin's Workers' Compensation checks, has become a tangle of contradictions. The Supreme Court file contains this crossfire:

The petition said Levin is penniless, living on charity, and that Hinerman took 100 percent of his compensation. The lawyer's reply said Levin got $12,640 temporary total disability benefits, $20,895 lump-sum benefits and $1,162 a month for the rest of his life—a potential $350,000 to $400,000, of which the attorney's share constitutes only 3 percent. The reply attacked "the deliberate distortion that the effect of the ruling by the circuit court gave Raymond A. Hinerman 100 percent of Sam Levin's Workers' Compensation benefits."

The petition said Levin barely understands English, is ignorant of law, and didn't realize he was signing papers to allow Hinerman a huge fee. The lawyer's

reply said the Russian is a college-educated engineer who schemed to "bamboozle" Hinerman.

The petition said Hinerman, as UMW lawyer, was paid by the union to handle Levin's claim; that 20 percent disability was granted, which Hinerman appealed, and "a one-day appearance was all that remained" to finish the case. Hinerman left the UMW and Levin retained him privately. The petition says it was unconscionable for the lawyer to take $12,088, the highest allowable share, "for a one-day court appearance" when the UMW had paid him to handle most of the case. But Workers' Compensation records say different UMW lawyers handled the case, and Hinerman said he "diligently pursued the appeal."

The outcome of this sorry affair probably won't be known for months. Meanwhile, it seems that heart attacks have become commercial commodities to be exploited for maximum profit. If a sufferer's attorney can attribute the attack to job strain, rather than life's other strains, both patient and lawyer are enriched.

What's the difference between one heart attack and another? Up to $400,000, this case demonstrates.

We granted the defendant the *Charleston Gazette*'s appeal to determine whether the judgment below for $75,000 in actual damages and $300,000 in punitive damages contravenes First Amendment, freedom of the press principles as articulated in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. We find that the judgment does not.

I.

The Court below ruled that Mr. Hinerman was a public official at the time he was libeled, based upon the fact that Mr. Hinerman was an appointed municipal judge, a member of the State Racing Commission, and a member

of the Board of Governors of the West Virginia State Bar (and subsequently vice president of the State Bar). Although we disagree with the lower court's ruling that Mr. Hinerman was a public official, (*see, infra*, at VI) we will assume for the purposes of reviewing the lower court's judgment that Mr. Hinerman was a public official. Thus, even under the stringent standards applicable to a public official, Mr. Hinerman is still entitled to recover.

In order for a public official or a candidate for public office to recover in a libel action, he must prove by clear and convincing evidence that: (1) there was the publication of a defamatory statement of fact or a statement in the form of an opinion that implied the allegation of undisclosed defamatory facts as the basis for the opinion; (2) the stated or implied facts were false; and, (3) the person who uttered the defamatory statement either knew the statement was false or knew that he was publishing the statement in reckless disregard of whether the statement was false. *See, Restatement (Second) of Torts*, §§ 565, 566 (1977); *Harte-Hanks Communications, Inc., v. Connaughton*, 491 U.S. 657 (1989); *Masson v. New Yorker Magazine, Inc.*, 501 U.S. ___, 111 S.Ct. 2419 (1991).

The greatest obstacle that a public official libel plaintiff must overcome is the First Amendment requirement that the publisher of a libel against a public official have a *subjective appreciation* at the time of publication that either (1) the defamatory statement is false or (2) the defamatory statement is being published in reckless disregard of whether it is false. This strict requirement is then reinforced by the *New York Times v. Sullivan* requirement that trial and appellate courts make independent reviews of the facts, although the standard of review has become less stringent than *New York Times* at first appeared to require. *See, infra* Part II.

A reading of U.S. Supreme Court libel cases in the last eight years demonstrates that there have been subtle but

important shifts in our libel law that reflect an ebbing tolerance for irresponsible media behavior. Among these changes, perhaps the most important is the U.S. Supreme Court's waning enthusiasm for reviewing libel judgments against media defendants.[17] Other important changes in-

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[17] Although the public official defamation opinions of the U.S. Supreme Court usually begin by citing the *New York Times v. Sullivan* standard of "actual malice" (*see Masson v. New Yorker Magazine, supra*; *Harte-Hanks, supra*; *Hustler Magazine v. Falwell*, 485 U.S. 46, 49 (1988)), there are indications that these approvals of *New York Times v. Sullivan* are mere genuflections as each year the Court moves farther away from the broad holdings of *New York Times v. Sullivan* and *Gertz v. Robert Welsh, Inc.*, 418 U.S. 323 (1974). In the recent decisions of *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) (a private figure plaintiff cannot recover without the statements in question being proven false), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (vacating a D.C. Circuit reversal of a grant of a summary judgment on the grounds that the Court of Appeals applied an incorrect standard for reviewing summary judgment), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985) (credit reports are not a matter of public concern, thus eliminating the need for applying *New York Times v. Sullivan* standard), the U.S. Supreme Court used painstaking care to articulate as narrow a holding as possible. Even after the recent changes in Justices, the narrowly drawn holdings have continued in *Masson* and *Harte-Hanks*.

In addition to the narrow holdings, the Court has denied *certiorari* in several cases that presented important defamation issues. *See Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (presenting a question of opinion versus fact); *DiSalle v. P.G. Publishing Co.*, 375 Pa. Super. 510, 544 A.2d 1345 (1988), *app. denied*, 557 A.2d 724 (Pa. 1989), *cert. denied*, 492 U.S. 906 (1989) (presenting a question on neutral reporting and upholding a jury verdict of $210,000 in compensatory damages and $2,000,000 in punitive damages); *Brown & Williamson Tobacco Corp. v. CBS, Inc.*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) (presenting a question of damage limits and upholding $2,000,000 in punitive damages against CBS, $1,000,000 in presumed damages against CBS and $50,000 against the reporter).

Since *Harte-Hanks*, the only case on defamation decided by the U.S. Supreme Court is *Masson v. New Yorker Magazine*, even though numerous petitions for *certiorari* were submitted. *See Loricchio v. Evening*

clude the express endorsement of a "clearly erroneous" standard for reviewing jury findings of fact, and recognition that egregious deviation from accepted journalistic

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News Association, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 51 (1992); *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir., 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 192 (1991); *Ward v. Roy H. Park Broadcasting Co.*, 403 S.E.2d 522 (N.C. App., 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 190 (1991); *McCoy v. Hearst Corp.*, 227 Cal. App. 3d 1657, 278 Cal. Rptr 596 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 939 (1992); *Mosesian v. McClatchy Newspapers, Inc.*, 233 Cal. App. 3d 1685, 285 Cal. Rptr 430 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1946 (1992); *Worldwide Church of God v. McNair*, *cert. denied*, ___ U.S. ___, 112 S. Ct. 380 (1991); *Flynt v. Spence*, 816 P.2d 771 (Wyo., 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1668 (1992); *Birsner v. Sivalingham*, *cert. denied*, ___ U.S. ___, 112 S. Ct. 1671 (1992); *Netzley v. Celebrezze*, 51 Ohio St.3d 89, 554 N.E.2d 1292 (1990), *reh'g denied*, 52 Ohio St.3d 710, 557 N.E.2d 1217 (1990), and *cert. denied* ___ U.S. ___, 111 S. Ct. 428 (1990); *Reuber v. Food Chemical News*, 925 F.2d 203 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2814 (1991); *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn., 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1071 (1991); *Dale v. Ohio Civil Service Employees Ass'n*, 57 Ohio St.3d 112, 567 N.E.2d 253 (1991), *cert. denied sub nom, Dale v. American Federation of State, County and Mun. Employees, Intern., AFL-CIO*, ___ U.S. ___, 111 S. Ct. 2853 (1991); *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 264 Cal. Rptr 699 (1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 51 (1990); *Ball v. E. W. Scripps Co.*, 801 S.W.2d 684 (Ky., 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1622 (1991); *Barber v. Perdue*, 194 Ga. App. 287, 390 S.E.2d 234 (1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 430 (1990); *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990); *cert. denied*, ___ U.S. ___, 111 S. Ct. 1586 (1991); *Smith v. McDonald*, 895 F.2d 147 (4th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 53 (1990); *Villarreal v. Harte-Hanks Communications, Inc.*, 787 S.W.2d 131 (Tex. App., 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1316 (1991); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky., 1990), *cert. denied*, *Lexington Herald-Leader Co. v. Warford*, ___ U.S. ___, 111 S. Ct. 754 (1991); *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 566 N.Y.S.2d 906, 567 N.E.2d 1270 (1991), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2261 (1991).

standards and ill will toward the victim are admissible circumstantial evidence of actual malice.[18]

Although egregious deviation from accepted standards of journalism *standing alone* will not carry the day for a public official libel plaintiff, egregious deviation is one important piece of circumstantial evidence which, when combined with other evidence, can lead a jury properly to find that subjective appreciation of falsity or recklessness existed at the time of publication. Similarly, although partisanship, animus toward the subject of a libel, or other "malicious" motives are not, alone, conclusive evidence of "actual malice" as that term is defined in *New York Times v. Sullivan*, *supra*, and subsequent cases, partisanship, ill

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[18] In *Harte-Hanks*, *supra*, Justice Stevens, a liberal writing for the majority, said:

> Certain statements in the Court of Appeals' opinion, when read in isolation, appear to indicate that the court at times substituted the professional standards rule for the actual malice requirement and at other times inferred actual malice from the newspaper's motive in publishing Thompson's story. Nevertheless, when the opinion is read as a whole, *it is clear that the conclusion concerning the newspaper's departure from accepted standards and the evidence of motive were merely supportive of the court's ultimate conclusion that the record "demonstrated a reckless disregard as to the truth or falsity of Thompson's allegations and thus provided clear and convincing proof of "actual malice" as found by the jury.* 842 F2d, at 847. *Although courts must be careful not to place too much reliance on such factors, a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence,* see Herbert v Lando, 441 US 153, 160, 60 L Ed 2d 115, 99 S Ct 1635 (1979); Tavoulareas v Piro, 260 US App DC 39, 66, 817 F2d 762, 789 (en banc), cert denied, 484 US 870, 98 L Ed 2d 151, 108 S Ct 200 (1987), *and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.* Thus, we are satisfied that the Court of Appeals judged the case by the correct substantive standard. [Emphasis added]

491 U.S., at 667-668.

will towards the subject of a libel, and other "malicious" motives may be considered by the jury in their determination of whether a subjective realization that the statement was false or a subjective realization that the statement was being published recklessly, existed at the time the statement was published.

In light of the subtle but important changes occurring in the national law of libel,[19] we shall attempt today to clarify both the media's privileges and the media's obligations as we see them in the State of West Virginia. First, however, it is necessary to explain why libel law is slowly shifting to become more solicitous of the rights of injured victims. Only by understanding the reasons for the pro-victim shift can the bar help their media clients to conform to the law with negligible self-censorship side effects.

The reason for the law's new concern for victims is probably best explained by S. Robert Lichter, Stanley

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[19] Indeed, the U. S. Supreme Court appears to be weary of the defamation issue. During the oral argument in *Anderson v. Liberty Lobby, Inc.*, *supra* note 17, after questioning the plaintiff's lawyer on the libel suit's chilling effect on the media, Chief Justice Rehnquist (then Justice Rehnquist) remarked that after reading the record in the case "one might truthfully say a chill on both your houses." *News Notes*, 12 Media L. Rep. (BNA) 1344 (Dec. 10, 1985).

A mere two years after dissenting in *Anderson*, Chief Justice Rehnquist, writing for the majority, affirmed "our considered judgment that such a [*New York Times v. Sullivan*] standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler*, *supra* note 17, 485 U.S. at 56. In *Hustler*, Chief Justice Rehnquist quoted from two opinions to which he had previously dissented: *Bose Corp v. Consumers Union, Inc.*, 466 U.S. 485, 515 (1984) (Rehnquist, J., dissenting); and *Philadelphia Newspapers, Inc. v. Hepps*, *supra* note 17 (Stevens, J., dissenting, joined by Justice Rehnquist). *Hustler*, 485 U.S. at 51-52. Chief Justice Rehnquist concurred in *Harte-Hanks* (1989) and *Masson v. New Yorker Magazine*, *supra* (1991). This shift by Chief Justice Rehnquist may signal that the majority position has moved sufficiently to accommodate the concerns of at least one of the dissenters.

Rothman and Linda S. Lichter, in their study *The Media Elite*:[20]

> In the early 1970's, even as America's Vietnam involvement wound down, a third front appeared in the now ongoing media-government conflict. Watergate became the next major long-running story in a decade to pit the national media against political authority. This time the *Washington Post* took the lead, though *The New York Times* and television also played major roles. In fact, the public image of a more adversarial media probably owes less to Bob Woodward and Cart Bernstein's investigations than to the celebrated confrontation between President Nixon and CBS White House correspondent Dan Rather.
>
> In the years that followed Watergate, the national media rode a wave of popularity and perceived power. They appeared to have chosen the "right" side of the critical conflicts of a turbulent decade. Moreover, they had consistently picked the winning side. They prevailed in conflicts with such seemingly entrenched forces as southern segregationists, Vietnam hawks, and two once-popular presidents. They were courted by politicians and revered on college campuses. Investigative journalism inherited the cachet young activists had earlier conferred on the Peace Corps and Nader's Raiders. Bright and idealistic young people flocked to the profession, lured by the prospect of exercising both personal creativity and social influence, not to mention the chance for fame and fortune.
>
> Inevitably, this wave of popularity crested and broke. By the early 1980's, public confidence in the

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[20] Adler and Adler (Bethesda, Md., 1986). This study was sponsored by the Center for the Study of Social and Political Change at Smith College, the Center for Media and Public Affairs, the Research Institute on International Change at Columbia University, and George Washington University.

> press had dropped sharply from its Watergate high point. Public criticism of media negativism and lack of fairness also began to emerge. A series of scandals and libel suits also seemed to cast doubt on the credibility of several major media outlets. At one point three of the most important and prestigious news organizations simultaneously faced embarrassing and financially threatening lawsuits—CBS from General William Westmoreland, *Time* from Israeli Defense Minister Ariel Sharon, and the *Washington Post* from Mobil Oil's Chief Executive Officer.
>
> Public disenchantment with the media may simply reflect changes in the social agenda. After Watergate, the great issues of the day offered less opportunity for the media to play the role of public tribune. Issues like inflation and energy could neither be explained nor solved by public morality prays. Television played a major role in the Iranian hostage crisis, but the cameras proved impotent in resolving the events they conveyed. Thus, in the 1980's, an upsurge of national pride, almost in reaction against a decade of bad news, seemed to catch the media by surprise. For the first time in two decades, the critical and reformist strain of national journalism seemed to go against the grain of a changing Zeitgeist.

The Media Elite, supra note 20, at 15-16.

Although the above passage is an excellent analysis of what is going on at the most abstract, philosophical level, there are also more sinister, self-serving forces at work in both the print and broadcast media that evoke a widespread demand among the public for greater media accountability. Thus, there is a rediscovery that the popular media are in the *entertainment* business far more than they are in the information business.[21] Although in the age

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[21] *See*, Niel Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*, Viking Penguin (New York, 1985).

of "yellow journalism" when William Randolph Hearst actually started wars[22] to create entertaining (and therefore profitable) headlines, the American public understood that sensationalism is the *sine qua non* of successful publishing (and now news broadcasting), the euphoria surrounding the press' advocacy of civil rights, disengagement from Vietnam, and honest government in the Watergate era obscured temporarily this previously well-known fact.[23]

Unfortunately, a large measure of the economic success of any newspaper or broadcast news department is dependent upon—sensational or "entertaining" scandal.[24] As

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[22] During the "ferment" before the Spanish-American War, Mr. Hearst's reporter in Cuba, noted artist Frederick Remington, telegraphed Mr. Hearst: "EVERYTHING IS QUIET. THERE IS NO TROUBLE HERE. THERE WILL BE NO WAR. I WISH TO RETURN." Mr. Hearst immediately wired back: "PLEASE REMAIN. YOU FURNISH THE PICTURES AND I'LL FURNISH THE WAR." Ferdinand Lundberg, *Imperial Hearst, A Social Biography*, Greenwood Press (Westport, Conn., 1970), at 68-69.

[23] The excesses of "yellow journalism" prompted Charles Warren and Louis Brandeis to write their famous *Harvard Law Review* article on the right to privacy. Warren and Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890).

[24] Of course, one can entertain to a fare-thee-well with the truth, and with regard to a public official, one can even entertain negligently. However, the courts now seem serious about refusing to allow entertainment, even at the expense of a public official, through the use of known, straight-up, boldfaced lies. *See, e.g., Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014 (1984). The Enquirer wrote:

> In a Washington restaurant, a boisterous Carol Burnett had a loud argument with another diner, Henry Kissinger. Then she traipsed around the place offering everyone a bite of dessert. But Carol really raised eyebrows when she accidently knocked over a glass of wine and started giggling instead of apologizing. The guy wasn't amused and "accidently" spilled a glass of wine over Carol's dress.

Despite the fact that the *Enquirer* printed a retraction of the story (admitting it was false), the jury awarded $300,000 compensatory dam-

Tennyson points out in *Idylls of the King*, "Merlin and Vivian,"[25] mankind has an inveterate predilection to rejoice in the suffering and degradation of others:

> . . . Tho' harlots paint their talk as well as face
> With colors of the heart that are not theirs.
> I will not let her know; **nine tithes of times**
> **Face-flatterer and backbiter are the same,**
> **And they, sweet soul, that most impute a crime**
> **Are pronest to it, and impute themselves,**
> **Wanting the mental range, or low desire**
> **Not to feel lowest makes them level all;**
> **Yea, they would pare the mountain to the plain,**
> **To leave an equal baseness; and in this**
> **Are harlots like the crowd that if they find**
> **Some stain or blemish in a name of note,**
> **Not grieving that their greatest are so small,**
> **Inflate themselves with some insane delight,**
> **And judge all nature from her feet of clay,**
> Without the will to lift their eyes, and see
> Her godlike head crown'd with spiritual fire,
> And touching other worlds. [Bold type added]

There is, nonetheless, no vehicle other than the commercial media for the transmission of information. A tightening of the libel laws, therefore, inevitably implies higher levels of self-censorship, which jeopardizes full, robust, and untrammeled political debate. It is for that reason, then, that trial and appellate courts, notwithstanding the pronounced pro-victim shift, are still more solicitous of the media than of any other class of business defendants in our tort system, and why courts continue to protect the media whenever a plaintiff has not proven his case by

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ages and $1,300,000 in punitive damages. The award was ultimately reduced to $50,000 compensatory damages and $150,000 in punitive damages.

[25] New American Library Edition, p. 135.

clear and convincing evidence. *See, Dixon v. Ogden*, ___ W.Va. ___, 416 S.E.2d 237 (1992).

In libel cases involving public officials or candidates for public office, there is no objective, reasonable person standard that holds everyone alike to a uniform level of due diligence or reasonable care. A ninth-grade school newspaper cannot be held to the same standard as *The Charleston Gazette*, and *The Charleston Gazette* cannot be held to the same standard as *The New York Times*. When, however, the evidence clearly demonstrates subjective appreciation of either falsity or recklessness, it is appropriate for courts to require accountability.[26]

II.

Under *New York Times v. Sullivan*, *supra*, it is the obligation of a reviewing court to make an independent

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[26] Certainly, in seeking greater media accountability courts are not holding the media to any higher standard than we hold ourselves. Indeed, both the media and the courts have a difficult time coping with principles of "accountability" because of possible "chilling effects." Like the media, the courts have a favored status, (i.e., judicial immunity) for mistakes—even serious mistakes. *Stump v. Sparkman*, 435 U.S. 349 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' *Bradley* [*v. Fisher*], 13 Wall. [335,] 351 [(1872)]"). However, the U.S. Supreme Court has placed some limits even on the courts, which are not allowed total immunity when a judge's conduct is both willful and outrageous. *Pulliam v. Allen*, 466 U.S. 522 (1984) (No judicial immunity bar to prospective injunctive relief under 42 U.S.C. § 1983; attorneys' fees may be awarded to plaintiff suing a judge and winning under § 1983 due to the Civil Rights Attorney's Fees Awards Act of 1976).

Unlike the media, the courts have strict and enforceable canons of ethics, and a litigant aggrieved by the abusive conduct of a judge is provided a forum where serious sanctions may be imposed upon the judge. *See West Virginia Judicial Code of Ethics* [1973, as amended]; *W. Va. Const.*, art. VIII, § 8. This system may not be perfect, but it is better than anything the media have.

evaluation of the facts to determine whether the jury's verdict was correct and liability can properly be imposed upon a media defendant. The standard of independent review is appropriately set out in *Harte-Hanks*, as follows:

> "In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full. Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the "opportunity to observe the demeanor of the witnesses." Bose, 466 US, at 499-500, 80 L Ed 2d 502, 104 S Ct 1949, the reviewing court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect,' " New York Times Co. 376 US, at 285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (quoting Pennekamp v Florida, 328 US 331, 335, 90 L Ed 1295, 66 S Ct 1029 (1946)).

Harte-Hanks, *supra*, at 688-689.

We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false, or that Mr. Haught published the editorial with a subjective appreciation that, *at least*, he was recklessly disregarding the truth. Although there is direct evidence on subjective appreciation from Mr. Haught and those who talked with Mr. Haught soon after the libelous editorial was written, there is also strong circumstantial evidence emerging from gross deviations from generally accepted standards of journalism. For example, before the editorial was published, no effort was made to contact Mr. Hinerman to determine whether he had anything to say

for himself that might make him look less reprehensible or might refute the facts alleged in the editorial.

In addition to egregious deviation from generally accepted standards of journalism, the record is also replete with evidence that the *Gazette*'s publisher, Mr. Chilton, bore strong animus towards lawyers in general and that he regularly wrote editorials highly critical of lawyers and the legal profession. Moreover, the evidence is overwhelming that Mr. Haught had serious misgivings about the appropriateness of the editorial,[27] and the jury was more than entitled to infer from Mr. Haught's own testimony that the editorial would not have been composed or published but for the explicit direction of the *Gazette*'s publisher, and that Mr. Haught conveyed his misgivings to his publisher at the time the editorial was written.

The petition filed on behalf of Mr. Levin in this Court contained the following paragraph:

> On November 16, 1982, the Court granted plaintiff's Motion that 100 percent of petitioner's Workmen's Compensation benefits be paid directly to plaintiff until the amount of 20 percent of benefits already awarded, plus costs, had been taken by plaintiff. Only after plaintiff had been paid these sums will petitioner receive any of his award. **The effect of the ruling is to give the plaintiff, a practicing attorney, all of petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever.**

Nonetheless, only the part that we have set forth in bold in the quote above was reproduced as an allegation in the defendant's editorial. As we said in Syllabus Point 5 of *Dixon v. Ogden*, *supra* in text:

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[27] *See supra* notes 10-15.

> Evidence that a media defendant intentionally "avoided" the truth in its investigatory techniques or omitted facts in order to distort the truth may support a finding of actual malice necessary to sustain an action for libel.

An earlier *Gazette* news story faithfully incorporated the distinction between 20 percent of benefits already awarded and *all* of Mr. Levin's Workers' Compensation award. Indeed, although under the requirement for subjective appreciation, one employee's knowledge that a story is false cannot be imputed to the employee writing the story under agency principles, the fact that in this case the truth was both generally known and generally available is further circumstantial evidence of "actual malice."

III.

The *Gazette*'s most important argument on appeal is that even though its editorial was both false and defamatory, the *Gazette* enjoyed two privileges that make the paper immune from liability. The first privilege the *Gazette* asserts is the privilege of "fair comment," which protects editorial opinion. *Milkovich v. Lorain Journal Co.*, 497 U.S. ___, 110 S.Ct. 2695 (1990). Indeed, this Court has expressly recognized the privilege of "fair comment," and has accorded the media wide latitude for editorial opinion, *Havalunch v. Mazza*, 170 W. Va. 268, 294 S.E.2d 70 (1981). Unless an opinion, no matter how scurrilous, implies undisclosed defamatory facts, we protect it. *Hustler*, *supra* note 17. Sharp, vituperative and biting criticism are at the heart of free debate. Thus, if the editorial at issue in the case before us were simply a recitation of the defendant's opinion that all lawyers are low-life and Mr. Hinerman, by membership in the legal profession, must on that account be low-life as well, the editorial would be privileged as fair comment.

The second privilege the *Gazette* asserts is the privilege to report official proceedings or public meetings. The details of this privilege are best summarized in § 611. *Restatement (Second) of Torts* (1977), which provides as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Consequently, if the *Gazette* had simply published the allegations against Mr. Hinerman set forth in Mr. Levin's petition, or a *fair* abridgement of those allegations, then that publication, notwithstanding that it would have been damning, would also have been privileged.

Although we recognize the privilege of fair comment and the privilege to report official proceedings, we do not accept the *Gazette*'s argument that it may shuffle the two privileges to create an editorial that is primarily a recitation of alleged *facts* where the reader is led to believe that the editorial writer *believes* the reported unsubstantiated facts, which are indeed untruths or half-truths. A regular news account that sets forth pleadings—notwithstanding that they are entirely one-sided—gives at least some notice to the reader that unsubstantiated allegations are being reported. Similarly, an article appearing on the editorial page that is derogatory, derisive or generally abusive, without alleging or implying any supporting facts, gives fair warning that the article is simply the editorial writer's opinion. However, when unsubstantiated allegations are so combined with strongly partisan opinion that the reader is led to believe that the editorial writer has access to undisclosed defamatory facts that lead him to believe the allegations he is reporting from a court proceeding are correct, the bounds of permissible behavior are overstepped.

Indeed, this very problem has been addressed by the learned restaters in Comment F to § 611, *Restatement (Second) of Torts* (1977) which says:

> Not only must the report be accurate, but it must be fair. Even a report that is accurate so far as it goes may be so edited and deleted as to misrepresent the proceeding and thus be misleading. Thus, although it is unnecessary that the report be exhaustive and complete, it is necessary that nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear or read it, as for example a report of the discreditable testimony in a judicial proceeding and a failure to publish the exculpatory evidence, or the use of a defamatory headline in a newspaper report, qualification of which is found only in the text of the article. *The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to any one, nor to indict expressly or by innuendo the veracity or integrity of any of the parties.* [Emphasis added]

Thus, to parallel the language of Comment F, the plaintiff in this case is entitled to recover because the *Gazette* made additions of its own to what would otherwise be a privileged report of a court proceeding that conveyed a defamatory impression, imputed corrupt motives to the plaintiff, and indicted the integrity of the plaintiff.

When damning allegations from a court proceeding are combined with caustic and vituperative editorial opinion, the defamatory impression fairly conveyed enjoys a strength that is some exponential function of the defamatory impression that either unsubstantiated allegations or naked opinion would convey standing alone. This type of conduct enjoys no privilege.

IV.

The *Gazette* asks that even if we sustain the compensatory damages in this case, we strike the punitive damages because such damages exert a chilling effect upon First Amendment rights. However, we see no error in the award of $300,000 in punitive damages under *Fleming Landfill, Inc. v. Garnes*, 186 W. Va. 656, 418 S.E.2d 897 (1991) and *TXO Production Corp., v. Alliance Resources, Corp.*, No. 20281 (W. Va. filed May 14, 1992).[28] Certainly, the punitive damages in this case bear a reasonable relationship to the compensatory damages and are lower than the five to one ratio that we indicated in *TXO*, *supra*, are presumptively valid in situations where people are simply "really stupid." *TXO*, slip op. at 35. However, in this case far greater punitive damages could be sustained on appeal because the evidence indicates that the defendant moved from the "really stupid" category discussed in *TXO* to the "really mean" category. *TXO*, slip op. at 37.

Because this case was tried on the theory that Mr. Hinerman was a public official, no recovery whatsoever could have been had unless the jury were convinced by clear and convincing evidence that the defendant acted from actual malice—i.e., that the defendant published false and defamatory material either knowing that it was false

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[28] Recently in *Browning-Ferris Industries, Inc. v. Kelco*, 492 U.S. 257, 280 (1989), the U.S. Supreme Court declined to disturb "the jury's punitive damages award" of $6 million on the grounds that it violated the Excessive Fines Clause of the Eighth Amendment. A year earlier, in *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court refused to disturb a punitive damage award of $1.6 million based on the insurer's bad-faith refusal to pay on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment. *See DiSalle v. P.G. Publishing Co.*, *supra* note 17 (upholding a jury verdict of $210,000 in compensatory damages and $2,000,000 in punitive damages); *Brown & Williamson Tobacco Corp. v. CBS, Inc.*, *supra* note 17 (upholding $2,000,000 in punitive damages against CBS, $1,000,000 in presumed damages against CBS and $50,000 against the reporter).

or with reckless disregard of whether it was false, and with an intent to injure the plaintiff.[29] No case could be stronger for punitive damages, and in light of the defendant's failure to retract its statement, its failure to offer an apology, and its failure to offer amends in any way for its defamatory statement, we see no just grounds for a remittitur. *Simon v. Shearson Lehman Bros., Inc.*, 895 F.2d 1304 (11th Cir. 1990) (holding a $5,000,000 punitive damage award to be excessive and finding the maximum amount of punitive damages in that case to be $1,000,000); *Schiavone Const. Co. v. Time, Inc.*, 847 F.2d 1069 (3rd Cir. 1988) (holding that punitive damages could be awarded if after a retraction was demanded by the plaintiff, no retraction was published).[30]

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[29] *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 170 (1967) (Warren, C.J., concurring) ("Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers."); *Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied* 429 U.S. 1041 (1977) (holding that the prevention of a chilling effect on the First Amendment has little application where actual malice, the *New York Times v. Sullivan* standard, has been shown); *Maheu v. Hughes Toolco*, 569 F.2d 459, 480 (9th Cir. 1977), (holding that "punitive damages are permissible once actual malice as defined in *New York Times* has been established").

[30] Furthermore, assuming that the *Gazette* believed that its statements were privileged and thus not actionable in a court of law, what conceivable motive other than surpassing ego and unbridled arrogance could have prevented the *Gazette* from making amends through a prompt, prominent and abject apology? In the long run, law and morality are not separate spheres, *See*, H. Berman, *Law and Revolution*, Harvard University Press (Cambridge, MA., 1983), which is why we observe the pro-victim shifts in the libel law that are discussed in part I in the text. Furthermore, appropriate apologies are easy to do. For example, in the 16 January 1992 issue of *The New York Review of Books*, the following apology appeared in a box 4.75 inches by 2.375 inches at the upper right hand corner of p. 15:

> MR. RANDOLL COATE: AN APOLOGY
>
> In a review of The Polk Conspiracy by Kati Marton which appeared in our issue of September 26, 1991, the reviewer

Nonetheless, for the benefit of future litigants, we would point out that the anxiety we expressed in *Sprouse v. Clay Communications, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, *cert. denied*, 423 U.S. 882 (1975) about the propriety of punitive damages still persists, and in appropriate circumstances we remain willing to craft special rules governing punitive damages against media defendants in deference to First Amendment considerations. However, in the punitive damages area there is a yet unresolved tension among: (1) the public's demand for accountability; (2) the surpassing arrogance of the media; and, (3) the courts' justified concerns that punitive damages will lead to excessive self-censorship. It is this tension that we hope to resolve today.

In *Garnes v. Fleming Landfill, supra*, we discussed the constitutional limits on punitive damages and set forth criteria for reviewing punitive damages awards. Among the factors set forth for determining whether, in a particular case, punitive damages are excessive is the criterion of whether the defendant made a timely offer to compensate the victim once liability became clear. Syllabus Point 3, *Garnes*.[31] Consequently, under this criterion of *Garnes*,

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reported certain allegations concerning Mr. Randoll Coate which we accept are entirely unfounded. We wish to make it abundantly clear that we accept without qualifications Mr. Coate's statement that he was not:

(a) connected in any way with a plot leading to the death of Mr. George Polk in Greece in 1948 or with any attempt to cover it up; and

(b) at any time in possession of information concerning the identity of those responsible.

We greatly regret the distress this has caused Mr. Coate and offer him our sincere apologies.

[31] One of the proposals for defamation reform would bar litigation if a retraction is published or broadcast before the institution of the suit. *See* The Gannett Center for Media Studies, Conference Report, *The Cost of Libel: Economic and Policy Implications* (1986), at 19. Some

the *Gazette* is entitled to no favorable consideration because the *Gazette* never apologized or attempted to make amends *even when it became abundantly clear to all concerned that a serious injustice had been done.*[32] If anything, the follow-up editorial quoted earlier that allegedly gave the matter "another look" actually added insult to injury.

We accept with enthusiasm the First Amendment obligation of the courts to protect robust and untrammeled discussion, but we fail to see how untrammeled media arrogance in any way furthers the legitimate ends of free speech. First Amendment, free speech considerations compel that we grant substantial privileges to the media, but we are also entitled to impose corresponding obligations when the media's fulfillment of those obligations will not compromise free speech one iota or lead to self-censorship. Obviously, when a media organization libels someone, that media organization exacerbates the harm it has done on every day that it permits the defamatory impression it has

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states have long taken retraction into account in reducing potential defamation liability. For example, the law in California is:

> In any action for damages for the publication of a libel in a newspaper, or of a slander by radio broadcast, plaintiff shall recover *no more than special damages* unless a correction be demanded and be not published or broadcast, as hereinafter provided. Plaintiff shall serve upon the publisher, at the place of publication or broadcaster at the place of broadcast, a written notice specifying the statements claimed to be libelous and demanding that the same be corrected. Said notice and demand must be served within 20 days after knowledge of the publication or broadcast of the statements claimed to be libelous.

Cal. Civ. Code § 48a(1) (West 1982).

[32] A reading of the record in this case, particularly the testimony of friends and associates of Mr. Hinerman who telephoned the *Gazette* to prompt a correction or retraction, leads almost ineluctably to the inference that this entire matter could have been settled for an apology. Nothing in the record before us leads us to believe that Mr. Hinerman welcomed this libel as an opportunity to begin a lawsuit against a well-heeled corporate defendant.

conveyed to persist in the mind of the reading or listening public.

Consequently, the media defendant who makes a prompt, prominent and abject apology calculated to reach as many people with the same or greater intensity as the original libel may reasonably ask to be treated differently for the purposes of punitive damages from the media defendant who persists in allowing the victim's reputation to suffer. Therefore, although a prompt, prominent and abject apology combined with an offer to pay reasonable damages will not shield a media defendant from paying actual damages, such offers to make amends may shield a media defendant from punitive damages under Syllabus Point 3 of *Garnes, supra*, as applied under *New York Times v. Sullivan, supra*, and *Sprouse v. Clay Communications, supra*.[33] However, when no appropriate apology or offer of reasonable compensation has been made, free speech considerations are not implicated when punitive damages similar to those that would be awarded in any other tort matter involving willful injury are awarded in a libel case.

In all American manufacturing, we impose liability for defective products. "Libel" is the peculiar name given to the product liability law that applies to the media. We have *not* given the media favored status over automobile, stepladder and lawn mower manufacturers because *we want arrogant, abusive, and irresponsible media* companies; rather, we have given favored status to the media because we do not want to chill robust and untrammeled debate about public issues.[34]

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[33] As is usual in these matters, slightly different rules apply when the actual damages are negligible. *See Hayseeds v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986); *TXO, supra*.

[34] *See*, Anderson, *Libel and Press Self-Censorship*, 53 Tex. L. Rev. 422, 432 (1975) (noting that the products liability analogy to media is limited because of the media's ability to decrease the risk "by increasing their self-censorship").

Today's media organizations are even bigger than they were at the time *New York Times v. Sullivan* was written, and increasingly both local newspapers and local broadcast stations are owned by distant conglomerates. *See, The Media Elite, supra* note 20. At the moment large media corporations give substantial control over editorial content to local management who live and work in the area served, but these management employees are also human beings with passions and flaws. Wide-open liability for punitive damages, therefore, is likely to induce profit-maximizing media conglomerates to impose standard corporate operating procedures requiring local management to be unreasonably conservative. *See* note 34. Papers that produce nothing but AP bear stories, pictures of children eating ice cream cones on the Fourth of July, and food store advertisements are not what the public needs every morning over coffee.

The tenure of the late W. E. Chilton, III, as the *Gazette*'s long-time publisher, demonstrates why tempering punitive damages against a corporate defendant when one or two employees has or have behaved improperly is entirely proper. Mr. Chilton was a corporate employee who owned substantially less than a controlling interest in the defendant corporation. Although Mr. Chilton was a man and not a saint, the broad license that his fellow stockholders accorded him to manage the *Gazette*'s editorial policy inured enormously to the benefit of the people of this State.

The record before us demonstrates that Mr. Chilton's editorial policy of strictly scrutinizing the behavior of lawyers led to one of the towering modern law reforms in this State, namely the abolition of the old "commissioners of account" system under which political appointees received enormous fees for precious little effort in the administration of decedents' estates. Mr. Chilton's premature death was a tragedy that has become progressively more obvious even to Mr. Chilton's detractors as the specter

becomes prominent of "The State's Newspaper" being bought by an anonymous national McMedia corporation with little understanding and even less affection for the State, its peculiar traditions, and its people. Although this is a strange context in which to say it, *ave atque vale* W. E. Chilton, III.

Consequently, we recognize that society is better served if some latitude for "human error" is accorded both our impecunious mom and pop papers and the great media conglomerates with regard to punitive damages. However, none of these policy considerations persists when punitive damages are sustained against a company that has refused to make a prompt, prominent and abject apology for a known mistake and failed to make a reasonable offer of settlement. Under those circumstances, tempering punitive damages nurtures arrogance and unaccountability rather than full and robust debate. Therefore, failure to extend a prompt, prominent and abject apology along with a prompt offer of reasonable damages when it has become clear that an injustice has been done removes any obstacle to the imposition of *TXO*-type[35] punitive damages once the high burden of proof for public official libel has been met.

Consequently, in libel cases we expressly endorse the "offer of fair settlement" criterion articulated in *Garnes, supra*, and, henceforth, that criterion will be the cynosure in determining the "reasonableness" of punitive damages in libel cases *whenever the media, as in the case before us, requests special treatment not accorded to automobile, step-ladder and lawn mower manufacturers because of First Amendment considerations.*

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[35] In *TXO*, this court sustained a judgment for $19,000 in actual damages and $10,000,000 in punitive damages under circumstances where an enormous national company, proceeding from the most malicious of motives, used consummate cunning combined with elaborate premeditation to attempt to steal thousands of acres of oil and gas belonging to a group of unsophisticated, hardworking country oil and gas producers.

V.

The *Gazette* assigns error to some of the court's instructions and objects to the court's failure to give some of the *Gazette*'s instructions. We have reviewed these assignments and find them sufficiently without merit not to be fairly raised.[36]

The *Gazette* also assigns error to the trial of this case in Brooke County. The *Gazette* maintains that at trial there was no proof that *The Charleston Gazette* was distributed in Brooke County by the *Gazette* on the day the libelous editorial appeared. Therefore, the *Gazette* argues, the Circuit Court of Brooke County did not have jurisdiction.

The *Gazette* confuses jurisdiction with venue. The pretrial order in this case, which was agreed to by both plaintiff's and defendant's counsel, provided that both jurisdiction and venue were proper in Brooke County. Although lack of subject matter jurisdiction cannot be waived, lack of proper venue certainly can. "Jurisdiction implies or imports the power of the court, venue the place of the action." *State ex rel. Chemical Tank Lines, Inc., v. Davis,*

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[36] Typical of these assignments is the following: The circuit court's instructions stated:

> The Court instructs the jury that a communication is defamatory if it tends so to harm the reputation of another or to lower him in the estimation of the community, such as by reflecting upon his personal morality or integrity, or if the communication deters third persons from associating or dealing with him.

The *Gazette* maintains that the circuit court should have included the following sentence in the instruction:

> A statement about a public official such as Mr. Hinerman cannot be considered defamatory unless it would reflect shame, contumely and disgrace upon him or unless it falsely charges him with a crime or personal dishonesty.

We fail to see how the defendant's language differs in purport from the instruction actually given by the circuit court.

141 W. Va. 488, 494, 93 S.E.2d 28, 32 (1956) (quoting *Arganbright v. Good*, 46 Cal. App. 2d Supp. 877, 116 P.2d 186). *See also, Sidney C. Smith Cord. v. Dailey*, 136 W. Va. 380, 67 S.E.2d 523 (1951); *W. Va. Const.*, art. VIII, § 6.[37]

VI.

Finally, the plaintiff cross-assigns error to the circuit court's determination that by virtue of his position as an appointed municipal judge, his membership on the West Virginia Racing Commission, and his membership on the Board of Governors of West Virginia State Bar, the plaintiff is a "public official." Although resolution of this issue is not necessary for our decision in this appeal, should a retrial become necessary, a resolution of this issue will be important. Consequently, we hold that under applicable First Amendment principles, Mr. Hinerman is not a public official or public figure for the purposes of this defamation action.

In defamation cases, three types of plaintiffs exist: (1) public officials and candidates for public office; (2) public figures; and, (3) private individuals. *Gertz, supra* note 17. Public officials are "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U. S. 75, 85 (1966). Publicly elected officials, of course, are "public officials" for purposes of defamation law. *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986). However, the public official category "cannot be thought to include

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[37] If, indeed, the lower court had ordered that Mr. Haught be hanged by the neck until he was dead, the court would have lacked jurisdiction to impose that penalty, and this court would have looked favorably on an assignment alleging that penalty as error, even if during the trial Mr. Haught had been so contrite as to waive all objection.

all public employees." *Hutchinson v. Proxmire*, 443 U.S. 111, 119 n.8 (1979).

Mr. Hinerman does not qualify as an elected public official by virtue of any of the positions relied upon by the *Gazette*. He was appointed to the municipal judgeship, he was appointed to a position on the racing commission, and he was elected by lawyers, not the public, to the Board of Governors of the West Virginia State Bar. Having failed the "elected public official" test, Mr. Hinerman can be designated a public official only if he has "substantial responsibility for or control over the conduct of governmental affairs." *Gertz*, *supra* note 17, 418 U.S. at 335, n.6 (quoting *Rosenblatt*, *supra*, 383 U.S. at 85). In this regard, the *Gazette* relies principally on Mr. Hinerman's state bar vice-presidency as proof of public official status. Yet, as an officer of the state bar, Mr. Hinerman exerted no control over government affairs. The state bar is merely an advisory body to the West Virginia Supreme Court of Appeals. The bar has no authority of its own. As requested by this Court, the state bar can propose changes to the various rules of the Court, but its role is never more than that of an assistant or advisor to this Court. A second vice-president in such a body hardly has "substantial responsibility" or control over government affairs.

In *Gertz*, *supra* note 17, the Supreme Court found Mr. Gertz to be a private individual rather than a public official even though he was a lawyer who had been a member and officer of the National Lawyers' Guild. Then, in *Lawrence v. Moss*, 639 F.2d 634 (10th Cir. 1981), *cert. denied*, 451 U.S. 1031 (1981), the plaintiff was considered to be a private figure, notwithstanding that he had served in numerous governmental capacities, including service as a member of Vice-President Agnew's staff, a deputy director of administration in the committee for reelection of the President, and as a "special assistant to the Assistant Administrator of the General Services Administration" in Washington, D.C.

Furthermore, even if circumstances could be imagined in which Mr. Hinerman would qualify as a public official for libel law purposes, this is not such a case because the editorial at issue in this case failed to identify Mr. Hinerman as a public official. When a defendant's defamatory statements "do not directly or impliedly identify the plaintiff as a public official," the public official doctrine is not available as a defense. *Bufalino v. Associated Press*, 692 F.2d 266, 273 (2d Cir. 1982), *cert. denied*, 462 U.S. 1111 (1983). Although it is not necessary to identify a president, governor, U.S. senator, congressman, or other wellknown public official as serving in a particular office, a private person like Mr. Hinerman who is only arguably a "public official" by virtue of his holding a low-level government or quasi-government position, must at least be identified in his public capacity before a media defendant may shield itself behind the special public official provisions of the libel law.

In *Bufalino*, *supra*, the plaintiff, a member of the Pennsylvania Bar who lived and practiced law in a community of approximately 7,000 people, was employed part-time by the community as borough solicitor at an annual salary of $3,500. Following the Pennsylvania gubernatorial election of 1978, then governor-elect Richard L. Thornburgh released to the press a list of campaign contributors. The plaintiff was identified on that list as having contributed $120. A news report appearing in the Associated Press stated that governor-elect Thornburgh had received campaign contributions from "several individuals with alleged mob ties." Among those persons named in the AP article was the plaintiff, who was described as "Charles Bufalino, Jr., an attorney who was related to Russell Bufalino, described by the Crime Commission as a Mafia boss."

On appeal from the district court's grant of summary judgment, the Associated Press argued, analogous to the *Gazette*'s argument here, that the appellant's performance of his duties as borough solicitor made him a public official

and that "a town attorney's alleged mob ties 'touch on' his fitness for office and hence are covered by the public official doctrine." The Second Circuit, however, found it unnecessary to rule on whether the AP allegation "touched on" the appellant's fitness for office, and found that the AP stories did not identify the appellant as the holder of any public office:

> The stories described appellant merely as "an attorney." A reader without prior knowledge of appellant's status as Borough Solicitor would most likely, and correctly, assume from the description that appellant is engaged in the private practice of law. The description would not directly or impliedly inform the reader that appellant holds any public office.

Bufalino at 273. The Second Circuit held that because there was no showing that readers of the AP article would recognize appellant as a public official, the public official doctrine was inapplicable. *See also, Foster v. Larendo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977); *Ocala Star-Banner Co. v. Damron*, 221 So.2d 459 (Fla. App. 1969), *appeal dismissed*, 231 So.2d 822 (Fla. 1970), *rev'd. on other grounds*, 401 U.S. 295 (1971) (defamatory article nowhere mentioned the plaintiff's status as mayor or as candidate for public office); *Guinn v. Texas Newspapers, Inc.*, 738 S.W.2d 303 (1987), *cert. denied*, 488 U.S. 1041 (1989) (defamatory article made no reference to plaintiff's official capacity, and there was no proof that plaintiff, an elected justice of the peace, was known as a public official beyond the confines of his region, the actual malice standard did not apply).

In the present case, Mr. Hinerman, at the time of the libelous editorial, was a lawyer who worked and resided in Weirton, an area remote from the principal places of the *Gazette*'s circulation. The *Gazette* did not proffer any evidence that any member of the general public, on reading the editorial, would know that Mr. Hinerman held any

public office. In particular, there was no evidence that a reader in Hancock or Brooke Counties would know of Mr. Hinerman's status as a second vice-president in the state bar (or any other office). The *Gazette* editorial itself makes absolutely no reference to Mr. Hinerman as anything other than a "lawyer" or "UMW attorney." Consequently, should this case be retried, we hold that it must be retried under the negligence standard that applies to the libel of a private individual.

Accordingly, for the reasons set forth above, the judgment of the Circuit Court of Brooke County is affirmed.

Affirmed.

No. 20489

Raymond A. Hinerman v. The Daily Gazette Company, Inc., a corporation, d/b/a The Charleston Gazette

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Filed - July 23, 1992

Miller, J., dissenting:

In my more than thirty-five years as a trial lawyer and as a Judge on this Court, I have never seen a major case so badly botched. It contains a virtual Augean stables' worth of error and surplusage.[1] These errors range from irrelevant denigrations of the *Gazette* to important omissions, *e.g.*, the majority's failure to quote the *Gazette*'s newspaper article. This article was admitted by the parties to be accurate, and it was the basis for the editorial at issue. The reason for this omission is obvious. If the two documents are compared, as is required by the First Amendment, there can be no finding of any substantial inaccuracy. As a consequence, there could be no libel, and, thus, the $375,000 verdict for compensatory and punitive damages would have to be set aside.

Though the majority takes pains to offer voluminous social commentary, it fails to address the controlling issue in the case—whether the *Gazette* is privileged against a libel suit because of its right to fairly and accurately report on official proceedings. The majority must manufacture

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[1] The problem with the Augean stables is briefly outlined in Bulfinch's Mythology 118 (Modern Library Edition): "Another labour (of Hercules) was the cleaning of the Augean stables. Augeas, King of Elis, had a herd of three thousand oxen, whose stalls had not been cleaned for thirty years."

legal authority to reach its stunning conclusion that the current United States Supreme Court has a diminished interest in media libel cases. For this proposition, the majority relies on twenty denials of certiorari by the United States Supreme Court. *See* ___ W. Va. at ___ n.17, ___ S.E.2d at ___ n.17 (Slip op. at 21). However, in fourteen of these cases the media defendant won below, and the plaintiff or another defendant sought certiorari.[2] In three other cases, the media defendant had sought certiorari because it felt it deserved a summary judgment on liability.[3] Two of the cases are unpublished and it is impossible to determine their status.[4] In only one of the reported cases did the media defendant have a monetary judgment rendered against it.[5]

The majority errs again in its discussion of the role of a retraction in a libel case. It proceeds without citing any relevant law, and, as might be expected, ends up with an erroneous conclusion. Finally, I cannot help but note the majority's wolf-in-sheep's-clothing patronizing of the press. It assures the *Gazette* of its high regard, while simultaneously battering the paper with various low blows supplied by the most implacable media critics. Were it not for judicial immunity, I suspect the *Gazette* would have a good libel suit against the majority.

Libel cases against a media defendant inevitably concern the Freedom of the Press Clause of the First Amendment.[6]

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[2] *See* footnote 17, *infra*.

[3] *See* footnote 18, *infra*.

[4] *See* footnote 19, *infra*.

[5] *See* footnote 16, *infra*.

[6] The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The freedom of the press is one of the most hallowed protections contained in our Constitution. It allows the press to act as the watchdog for our citizens and to report on, criticize, and otherwise bring to public attention the actions and conduct of the government.[7] Through the diligence of the press, we have the power to insist that our government remain true to Lincoln's ideal: "A government of the people, by the people, [and] for the people[.]"

I.

The Facts

This libel action is based on the *Gazette* editorial of May 20, 1983, which is quoted in the majority's opinion. ___W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 4-6). As the majority acknowledges, the plaintiff's sole claim of libel rests on the editorial's statement that Levin asserted that "his lawyer took every penny, getting $12,000 for one day's work," and an alleged further defamation caused by the editorial's omission of the phrase "until the [fee] bill was paid." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op.

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[7] The United States Supreme Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 491-92, 95 S. Ct. 1029, 1044-45, 43 L.Ed.2d 328, 347 (1975), outlined the role of the press in these terms:

> "[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

at 6). This latter phrase was contained in an earlier news article that was written by a *Gazette* staff reporter and published on May 18, 1983. The editorial's assertion about the lawyer taking every penny and getting $12,000 for one day's work was a substantially accurate rendition of the information contained in the *Gazette*'s news article.

No claim was made in the libel suit that the news article was inaccurate or in any manner false.[8] The parties agree

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[8] The majority refuses to set out the newspaper article in its opinion because the article demonstrates the substantial accuracy of the editorial. The contents of the article, including its headline, are:

"Immigrant appeals lawyer's fees to court"

By Mark Ward
Staff Writer

"A Russian immigrant who was assessed more than $12,000 in legal fees for a one-day hearing on a Workers' Compensation appeal won a review of his case by the state Supreme Court Tuesday.

"Sam Levin, a native of the Soviet Union who emigrated to Israel and then to the United States, is appealing a default judgment that Wheeling lawyer Raymond A. Hinerman received against him for the fees.

"Hinerman sued Levin for the fees last August and, after Levin neglected to answer the suit, received permission from Ohio County Circuit Judge Callie Tsapis to take 100 percent of Levin's monthly Workers' Compensation benefits until his fees are paid.

"Lawyer David Gold told the high court Tuesday that the fees appear to be excessive and said he was appalled that Levin, who is now staying with friends and family in Miami Beach, Fla. and has no source of income, is compelled to deliver his benefit checks to Hinerman.

"Levin emigrated from the Soviet Union to Israel in 1973, then traveled to the United States in 1975, the appeal petition states. He first came to Massachusetts, but because he was trained as a coal miner in the Soviet Union, decided to move to Wheeling

that the editorial was based on this news article. Moreover,

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where he got a job with Consolidated Coal Co. in April 1977.

"In October 1977 he suffered a heart attack and was unable to work.

"According to the petition, Hinerman, a former staff counsel for United Mine Workers District 6, represented Levin in the Workers' Compensation claim for free at first as a benefit of union membership.

"However, Levin was granted only 20 percent disability. Hinerman, meanwhile, quit the Union but convinced Levin to retain him as a private attorney to bring the appeal. After a one-day hearing, the petition states, Levin was granted permanent total disability.

"Last July Hinerman sent Levin a bill for $4,201.88 for representing him in the hearing. When Levin neglected to pay, Hinerman brought suit against Levin, Consolidation Coal Co., Employment Services Corp. and Workers' Compensation Commissioner Gretchen Lewis for $12,088.54.

"In November, Levin wrote a letter to Judge Tsapis, saying that he could not afford to hire a lawyer, but felt that he owed Hinerman nothing. 'I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage,' he wrote.

"Hinerman asked for a default judgment against Levin, and Judge Tsapis, ruling that Levin's request did not comply with court rules, approved it. The judge also ruled that Hinerman could attach 100 percent of Levin's Workers' Compensation benefits until the bill was paid.

"The petition also noted that Hinerman stated in a hearing that when Levin was flown from Florida for the appeal hearing that 'the costs in this case, to try to save Mr. Levin money, were charged to another client. . . . So he probably saved a good $1,000 in costs.'

"The petition asked that Levin be given an opportunity to defend himself, saying, 'An immigrant who must have all correspondence translated, who is in ill health, living on the charity of friends an [*sic*] family and ignorant of the legal process should be excused his neglect in not timely answering (the) complaint.' "

it is not disputed that the article was derived from the contents of a petition for appeal filed in this Court by Mr. Levin's appellate lawyer, Mr. Gold. No claim is made that the news article did not accurately reflect the contents of the petition for appeal.[9]

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[9] The petition for appeal filed by Attorney Gold contained these factual assertions, which were summarized in the *Gazette*'s news article and its editorial:

> "A default judgment was granted to the plaintiff on November 9, 1982, against petitioner in the amount of Twelve Thousand Eighty-Eight Dollars and Fifty-Four Cents ($12,088.54) by the Circuit Court of Hancock County, the Honorable Callie Tsapis presiding, and your petitioner unsuccessfully sought to have that judgment vacated. Pursuant to said default judgment, said Court Ordered the attachment of 100% of petitioner's Workmen's Compensation benefits in favor of the plaintiff, a practicing attorney in Hancock County, West Virginia.
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> * * *
>
> "Petitioner is a native-born Russian who emigrated to Israel in 1973, and on to the United States in 1975. He first resided in Massachusetts, but because his training in Russia and Israel was in underground mining, he moved to Wheeling, West Virginia, in April, 1977, to work in the coal mines. In October, 1977, he was disabled by a heart attack which occurred in the course of his employment.
>
> "As a member of The United Mine Workers of America (UMWA), petitioner's Workmen's Compensation claim was handled, without charge to him, by UMWA District 6 counsel. During the times pertinent hereto (March, 1981, to January, 1982), plaintiff served as District 6 counsel. During that time, petitioner was awarded a 20% disability rating for his injury; plaintiff, in his capacity as UMWA counsel, filed an appeal in July, 1981.
>
> "In January, 1982, plaintiff resigned as District 6 counsel. The incoming counsel recommended to your petitioner that he retain plaintiff as his private attorney before the Workmen's Compensation Appeal Board. Plaintiff sent petitioner a letter which authorized the Workmen's Compensation Commissioner to send any award checks to plaintiff. Petitioner signed the 'authorization' on

There is no question in my mind that the *Gazette* editorial accurately summarized its earlier news article. The thrust of the editorial was correct—that for one day's work

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January 28, 1982, after moving to Miami Beach, Florida.

"According to defendant's testimony, when his landlord explained to him the consequences of the 'authorization' he had signed, petitioner revoked the authorization. On July 8, 1982, plaintiff sent petitioner a bill for Four Thousand Two Hundred One Dollars and Eighty-Eight Cents ($4,201.88) for services rendered on his one-day appeal.

"Plaintiff instituted the instant suit when petitioner failed to pay the bill. In his complaint, however, plaintiff sought payment of the statutory limit of twenty percent (20%) of benefits paid during a period of two hundred eight (208) weeks ($12,088.54) plus interest and costs. This amount was in addition to fees paid to plaintiff for work done on petitioner's case while plaintiff was employed by the UMWA.

"Petitioner testified that he was uncertain of the legal consequences of the suit against him and was unable to hire an attorney because of his financial condition. He did file *pro se* pleadings in an attempt to respond to the case against him, and following the entry of said judgment, persuaded instant counsel to move for the vacation of that judgment. These efforts were unsuccessful, leading to the prosecution of this appeal.

• • •

"On November 1, 1982, petitioner, who apparently has no knowledge of the legal process, mailed a letter to the Circuit Court Judge of Hancock County outlining what he felt to be his defenses to the instant suit. He wrote that, 'There are no legal obligations between him and me.' Additionally, petitioner offered to appear before the Court and ask the Judge for her 'opinion' on the matter, apparently believing that his actions would suffice to delay or end any action against him.

"The Judge refused to recognize this and other *pro se* attempts to answer because they 'failed to comply with the Rules.'. . .

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"On November 16, 1982, the Court granted plaintiff's Motion that 100 percent of petitioner's Workmen's Compensation benefits

Hinerman had charged Levin a legal fee in excess of $12,000. When Levin failed to properly answer the fee suit, Hinerman obtained a default judgment and was able

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be paid directly to plaintiff until the amount of 20 percent of benefits already awarded, plus costs, had been taken by plaintiff. Only after plaintiff has been paid these sums will petitioner receive any of his award. The effect of this ruling is to give to the plaintiff, a practicing attorney, all of petitioner's income while the petitioner, who is totally disabled, has no source of income whatsoever."

The attorney's petition for appeal then reached several legal conclusions:

> "The West Virginia Legislature has set a limit on the fee received by an attorney for his work in a Workmen's Compensation case. West Virginia Code §23-5-5 reads, in pertinent part:
>
> > In no case shall the fee received by the attorney of such claimant or dependent be in excess of twenty percent of the benefits to be paid during a period of two hundred eight weeks.
>
> "In providing a sanction for charging or receiving a fee in excess of the set maximum, the statute states that any contract entered into for more than 20 percent of the benefits to be paid during a period of two hundred eight (208) weeks 'shall be unlawful and unenforceable as contrary to the public policy of this state.' Furthermore, any fee charged *or received* by an attorney in violation thereof shall be deemed 'an unlawful practice and render the attorney subject to disciplinary action.' (Emphasis Added). Thus, in the instant case, the fee *received* by the plaintiff, although not charged under a contract with petitioner, nevertheless falls within the statutory prohibition. According to the explicit statutory language, then, the plaintiff's receipt of payment from the United Mine Workers of America, in addition to 20 percent of the petitioner's benefits during a period of two hundred eight (208) weeks exceeds the statutory maximum and is an 'unlawful practice' which should not be tolerated."

The petition further asserted:

> "An immigrant who must have all correspondence translated, who is in ill health, living on the charity of his friends and family and ignorant of the legal process should be excused of his neglect in not timely answering plaintiff's complaint."

to seize 100 percent of Levin's workers' compensation benefits. Although the editorial did not use the phrase "until the [fee] bill was paid," there is no doubt that 100 percent of Levin's workers' compensation benefits were subjected to Hinerman's attachment. Thus, from Levin's viewpoint, he was not receiving a single penny of his workers' compensation benefits because every penny was going to the lawyer.

The gist or "sting" of the *Gazette* editorial was accurate. Whether the $12,000 default judgment would absorb the entire award is a matter that was never revealed. The majority expects, indeed requires, either the editorial writer or the *Gazette*'s reporter to make this calculation, though it would require the legal ability to understand the complicated law surrounding our workers' compensation program.

II.

First Amendment Law

In this case, the plaintiff was found by the trial court to be a public official because he held a variety of public offices. At the time the editorial was published, Mr. Hinerman was the municipal judge for the City of Weirton; a second vice-president of the West Virginia State Bar, an organization legislatively created and subject to the supervision of this Court[10]; and, finally, a member of the West Virginia Racing Commission. As a public official, Mr. Hinerman is prohibited from recovering damages for a defamatory falsehood, unless he can prove the statement was made with actual malice. Recently, the United States Supreme Court reaffirmed this standard in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, ___, 110 S. Ct. 2695, 2703, 111 L. Ed. 2d 1, 14 (1990):

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[10] *See* W. Va. Code, 51-1-4a.

> "In 1964, we decided in *New York Times Co. v. Sullivan*, 376 U.S. 254 [84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964)], that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for 'a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.' . . ." (Citation omitted).

Milkovich also recognized a vital procedural requirement of First Amendment libel law: An appellate court has an obligation to make an independent examination of the evidentiary record to determine if there were sufficient facts to constitute libel.[11] Thus, a jury verdict is not conclusive in a First Amendment libel case.

More recently in *Masson v. New Yorker Magazine, Inc.*, ___ U.S. ___, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991), the United States Supreme Court acknowledged again that

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[11] The applicable language in *Milkovich*, 497 U.S. at ___, 110 S. Ct. at 2705, 111 L. Ed. 2d at 16-17, is:

> "The Court has also determined 'that in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 [104 S. Ct. 1949, 80 L. Ed. 2d 502] (1984) (quoting New York Times, 376 U.S., at 284-286 [84 S. Ct. 728-29, 11 L. Ed. 2d 686]. 'The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law.' *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 685 [109 S. Ct. 2678, 2694, 105 L. Ed. 2d 562, 587] (1989)."

when a public figure or official is a plaintiff in a libel action, the plaintiff must prove the libel by clear and convincing evidence.[12] More importantly, *Masson* explained in detail how the falsity of a publication was to be determined:

> "The common law of libel takes but one approach to the question of falsity, regardless of the form of the communication. See Restatement (Second) of Torts § 563, Comment c (1977); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 776 (5th ed. 1984). It overlooks minor inaccuracies and concentrates upon substantial truth. As in other jurisdictions, California law permits the defense of substantial truth, and would absolve a defendant even if she cannot 'justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in the details.' B. Witkin, Summary of California Law, § 495 (9th ed. 1988) (citing cases). In this case, of course, the burden is upon petitioner to prove falsity. See *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 [106 S. Ct. 1558, 1563, 89 L. Ed. 2d 783, 792] (1986). The essence of that inquiry, however, remains the same whether the burden

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[12] *Masson* addressed whether summary judgment should have been granted for the defendant magazine, but the same burden applies at trial:

> "The parties agreed that petitioner was a public figure and so could escape summary judgment only if the evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that respondents published a defamatory statement with actual malice as defined by our cases. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-256 [106 S. Ct. 2505, 2513-2514, 91 L. Ed. 2d 202, 216] (1986)." ___ U.S. at ___, 111 S. Ct. at 2428, 115 L. Ed. 2d at 467.

> rests upon plaintiff or defendant. Minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' *Heuer v. Kee*, 15 Cal.App.2d 710, 714, 59 P.2d 1063, 1064 (1936); see also *Alioto v. Cowles Communications, Inc.*, 623 F.2d 616, 619 (CA 9 1980); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 465-466 (CA 9 1978). Put another way, the statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' R. Sack, Libel, Slander, and Related Problems 138 (1980); see, e.g., *Wheling v. Columbia Broadcasting System, Inc.*, 721 F.2d 506, 509 (CA 5 1983); see generally R. Smolla, Law of Defamation § 5.08 (1991). Our definition of actual malice relies upon this historical understanding." ___ U.S. at ___, 111 S. Ct. at 2432-33, 115 L. Ed. 2d at 472-73.

These constitutional commands are made obligatory on states through the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800, 41 L. Ed. 2d 495 (1974). Until today's opinion, we have followed these commands with commendable fidelity, as reflected by Syllabus Points 1 through 4 of *Dixon v. Ogden Newspapers, Inc.*, ___ W. Va. ___, 416 S.E.2d 237 (1992):

> "1. ' "[A] public official . . . can sustain an action for libel only if he can prove that (1) the alleged libelous statements were false or misleading; (2) the statements tended to defame the plaintiff and reflect shame, contumely, and disgrace upon him; (3) the statements were published with knowledge at the time of publication that they were false or misleading or were pub-

lished with a reckless and willful disregard of truth; and, (4) the publisher intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material." Syllabus Point 1, in part, *Sprouse v. Clay Communication, Inc.*, 158 W. Va. 427, 211 S.E.2d 674, 95 A.L.R.3d 622, *cert. denied*, 423 U.S. 882, 96 S. Ct. 145, 46 L. Ed. 2d 107 (1975).' Syllabus point 4, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

"2. 'Under *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1969), whenever there is a First Amendment defense to actions under state law, the state court is required to be a judge of both the facts and the law . . . .' Syllabus Point 2, in part, *Mauck v. City of Martinsburg*, 167 W. Va. 332, 280 S.E.2d 216 (1981).

"3. 'A court must decide initially whether as a matter of law the challenged statements in a defamation action are capable of a defamatory meaning.' Syllabus point 6, *Long v. Egnor*, 176 W. Va. 628, 346 S.E.2d 778 (1986).

"4. In order to sustain an action for libel, a public official must present clear and convincing evidence that the media defendant acted with actual malice. Actual malice must be proven with convincing clarity."

See also Long v. Egnor, 176 W. Va. 628, 346 S.E.2d 778 (1986); *Mauck v. City of Martinsburg*, 167 W. Va. 332, 280 S.E.2d 216 (1981).

Thus, under First Amendment law, the plaintiff had to prove by clear and convincing evidence each of the following elements to recover damages against the *Gazette*. First, the plaintiff had to prove that the editorial's state-

ments were, in the language of *Masson*, false or misleading to the extent that the true facts would have produced a " 'different effect on the mind of the reader' " because "[m]inor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, of the libelous charge be justified.' " ___ U.S. at ___, 111 S. Ct. at 2433, 115 L. Ed. 2d at 472. (Citations omitted).

Second, the editorial must be shown to have defamed the plaintiff. Third, it must be shown that the statements were published with the knowledge that they were false, misleading, or published with reckless and willful disregard of the truth. Finally, the plaintiff must show that the publisher of the editorial intended to injure the plaintiff through the knowing or reckless publication of the alleged libelous material. *See* Syllabus Point 1, *Dixon v. Ogden Newspapers, Inc.*, *supra*.

As outlined above, it is at the time of the publication of the alleged libel that the knowledge of falsity and recklessness and willful disregard of the truth is tested. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989); *St. Amant v. Thompson*, 390 U.S. 727, 88 S. Ct. 1323, 20 L. Ed. 2d 262 (1968). Thus, the majority's attempt to impute falsity and reckless disregard by reciting conversations and events that colleagues of Mr. Hinerman had with employees of the *Gazette* after the editorial was published are not relevant.[13] Nor is its reliance on the supposed bias of Mr. Chilton, the *Gazette* editor, against lawyers of any legal consequence. As the Supreme Court made clear in *Masson v. New Yorker Magazine, Inc.*, ___ U.S. at ___, 111 S. Ct. at 2429, 115 L. Ed. 2d at 468, ill will is not equivalent

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[13] The most egregious fact left out of the petition for appeal was that Mr. Levin was subsequently awarded a permanent total disability award. Under our workers' compensation statute, Mr. Hinerman was then entitled to a greater legal fee. For this reason, Mr. Levin lost his appeal. *See Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983).

to actual malice for First Amendment purposes: "Actual malice under the New York Times standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. *See Greenbelt Co-operative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970)."

Another critical piece of First Amendment libel law comes into play in this case because the editorial was based on facts that had initially been obtained by a news reporter from a petition for appeal filed in this Court. There is a privilege under the First Amendment for fair and accurate reporting on official proceedings. Though some of the facts asserted in an official proceeding may be untrue, the media is not liable for reporting them.[14]

For example, in *Time, Inc. v. Pape*, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971), *Time Magazine* was sued for libel by a police officer. He claimed that *Time*'s article had defamed him because it failed to inform the reader that the facts surrounding an episode of police brutality were obtained from allegations in a civil action filed against the plaintiff. *Time*'s article was based on a report issued by the United States Commission on Civil Rights which dealt, in part, with police brutality. In that report, the Commission outlined what it said were the alleged

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[14] Incredibly, the majority's entire discussion of this important privilege to report official proceedings is contained in three paragraphs. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 32-34). As its only authority, the majority cites Section 611 of the *Restatement (Second) of Torts* and comment f under this section. The majority makes no attempt to analyze any of the First Amendment cases discussing this privilege. This lapse is understandable because to intelligently discuss this law would require a conclusion that the libel verdict cannot be sustained. In this unbridled ignorance, the majority writer, a devotee of Tennyson's *Idylls of the King*, "Merlin and Vivian," *see* ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 27), might take heed of this thought from the same work by Tennyson: "Blind and naked ignorance delivers brawling judgments unashamed, on all things all day long."

facts in eleven typical cases of police brutality. The Commission's report stated that in none of the cases could it be determined conclusively whether the complainants or the police were correct in their statements.

The Supreme Court refused to find that *Time*'s omission of this information by its failure to use the term "allegation" in the news article made the article false:

> "In light of the totality of what was said in Justice, we cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to the allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice.' " 401 U.S. at 289, 91 S. Ct. at 639, 28 L. Ed. 2d at 53.

Subsequently, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 492-93, 95 S. Ct. at 1045, 43 L. Ed. 2d at 348, the Supreme Court further explained the purpose of this First Amendment privilege:

> "The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized. This Court, in an opinion written by Mr. Justice Douglas, has said:
>
> 'A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. *Those who see and hear what transpired can report it with impunity. . . .' Craig v. Harney*, 331 U.S. 367, 374 [67 S. Ct. 1249, 1253, 91 L. Ed. 1546, 1551] (1947). (Emphasis added)."

In *Lavin v. New York News, Inc.*, 757 F.2d 1416 (3rd Cir. 1985), the newspaper published a summary of a 165-page F.B.I. agent's affidavit filed with a federal court in order to obtain search warrants. According to the news article, F.B.I. informants indicated that several police officials were involved in taking bribes from the mob. The article's headline stated, "The Mob: Best Cops Money Can Buy." The article included the plaintiff's picture and that of another police officer and both were identified by their names and titles. The news article did contain a statement by the plaintiff saying that he had not accepted bribes.

The central controversy in the libel action was whether the article together with its headline and photograph wrongly accused the plaintiff of committing a crime, when there was no specific statement in the affidavit that Lavin had accepted a bribe. The Court of Appeals for the Third Circuit disposed of the issue by finding the article not libelous because it was substantially accurate, and the newspaper could not be held accountable for factual inaccuracies in the affidavit itself:

> "In the final analysis, the issue is not whether the affidavit included direct evidence of the payment of money to plaintiff, but whether, fairly read, the affidavit asserts that the FBI had concluded that plaintiff was corrupt. In our view, the affidavit undoubtedly amounts to an assertion that plaintiff was directly involved in a corrupt relationship with members of organized crime in the Bayonne, New Jersey, area.
>
> "We hasten to add that, given the present procedural posture of the case, we must assume that the FBI affidavit was false in every particular, and that plaintiff was and is entirely innocent, and was merely carrying out appropriately his duties as head of the Internal Affairs Department. But whether the FBI agents misinter-

> preted the situation, had incorrect information, or even consciously misstated the facts in the affidavit, there can be no liability on the part of the defendants for republishing the contents of an official document, so long as their account is reasonably accurate and fair. We hold, as a matter of law, that it was." 757 F.2d at 1420.

See also Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287 (D.C. Cir.), *cert. denied*, 488 U.S. 825, 109 S. Ct. 75, 102 L. Ed. 2d 51 (1988); *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113 (2nd Cir.), *cert. denied*, 434 U.S. 1002, 98 S. Ct. 647, 54 L. Ed. 2d 498 (1977); *Schiavone Constr. Co. v. Time, Inc.*, 735 F.2d 94 (3d Cir. 1984); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988); *Clark v. American Broadcasting Co.*, 684 F.2d 1208 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040, 103 S. Ct. 1433, 75 L. Ed. 2d 792 (1983); *Schuster v. U.S. News & World Report, Inc.*, 602 F.2d 850 (8th Cir. 1979); *Green Acres Trust v. London*, 141 Ariz. 609, 688 P.2d 617 (1984); *Huszar V. Gross*, 468 So. 2d 512 (Fla. App. 1985); *Newell v. Field Enters., Inc.*, 91 Ill. App. 3d 735, 47 Ill. Dec. 429, 415 N.E.2d 434 (1980); *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650 (Mo. App. 1991); *Cox v. Lee Enters., Inc.*, 222 Mont. 527, 723 P.2d 238 (1986); *Oweida v. The Tribune-Review Publishing Co.*, ___ Pa. Super. ___, 599 A.2d 230 (1991), *appeal denied*, ___ Pa. ___, 605 A.2d 334 (1992); *Padgett v. Sun News*, 278 S.C. 26, 292 S.E.2d 30 (1982); *Mark v. KING Broadcasting Co.*, 27 Wash. App. 344, 618 P.2d 512 (1980), *aff'd sub nom., Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 102 S. Ct. 2942, 73 L. Ed. 2d 1339 (1982).

This very issue was involved in our recent case of *Dixon v. Ogden Newspapers, Inc., supra*, which the majority elects to ignore. I can understand why—*Dixon* is against the majority's current holding. In *Dixon*, we unanimously agreed that the newspaper had not libeled two police of-

ficers even though its article about a magistrate court trial suggested that the police officers may have disclosed an impending vice raid to a tavern owner. We found, after an independent review of the record, that the article was substantially accurate.

In my view, this law is dispositive of the case. The *Gazette*'s initial news article on the Levin appeal to this Court was a fair and accurate summary. The editorial's single omission was its failure to state that Levin's workers' compensation checks were attached and paid to Attorney Hinerman "only until the [fee] bill was paid." The undisputed fact was that Levin received no funds until Attorney Hinerman's fee bill was paid. Unless the reporter or the editorial writer was an expert on workers' compensation award payments, there was no way for either of them to know whether Levin's workers' compensation award would even be sufficient to pay his legal fees.

Moreover, the real harm was that the attachment took all of Levin's source of funds.[15] He was impoverished and without any income. Consequently, omitting the phrase "until the bill was paid" created no defamatory implication—indeed, this phrase would have added nothing because one would assume that an execution could not collect more than the amount of the debt owed.

If the *Gazette*'s editorial is tested in light of its privilege to report with substantial accuracy documents filed in official proceedings, then I have no doubt that it has met this standard. Under the constitutional prerogative of an appellate court to review First Amendment free press claims, the only conclusion is that there was no material omission and, therefore, no liability on the part of the *Gazette*.

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[15] Because workers' compensation benefits are not wages, there was no limit on the amount that could be taken from any one check.

III.

Other Errors

A.

I reject the majority's dubious assertion that the current membership of the United States Supreme Court has a "waning enthusiasm for reviewing liable judgments against media defendants." ___ W. Va. at ___, ___ S.E. 2d at ___. (Slip op. at 20) This remarkable insight is buttressed by a list of twenty denials of certiorari in the third paragraph of footnote 17 of the majority opinion. ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 21). However, only one of these cases involved a monetary judgment against a media defendant.[16]

In fourteen of the cases, the media defendant was exonerated from the alleged libel, and the plaintiff or another defendant sought certiorari to the Supreme Court.[17] In

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[16] *Ball v. E.W. Scripps*, 801 S.W.2d 684 (Ky. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1622, 113 L. Ed. 2d 719 (1991).

[17] *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 2814, 115 L. Ed. 2d 986 (1991); *Smith v. McDonald*, 895 F.2d 147 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 53, 112 L. Ed. 2d 29 (1990); *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 112 S. Ct. 192, 116 L. Ed. 2d 152 (1991); *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1586, 113 L. Ed. 2d 650 (1991); *Mosesian v. McClatchy Newspaper, Inc.*, 233 Cal. App. 3d 1685, 285 Cal. Rptr. 430 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1946, 118 L. Ed. 2d 551 (1992); *McCoy v. Hearst Corp.*, 227 Cal. App. 3d 1657, 278 Cal. Rptr. 596 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 939, ___ L. Ed. 2d ___ (1992); *Fletcher v. San Jose Mercury News*, 216 Cal. App. 3d 172, 264 Cal. Rptr. 699 (1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 51, 112 L. Ed. 2d 26 (1990); *Locricchio v. Evening News Ass'n*, 438 Mich. 84, 476 N.W.2d 112 (1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1267, 117 L. Ed. 2d 495 (1992); *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1071, 112 L. Ed. 2d 1177 (1991); *Ward v. Roy H. Park Broadcasting*, 328

three of these cases, the media defendant obtained a summary judgment, which was reversed on appeal, and the media appealed to the Supreme Court.[18] Two of the cases are unpublished opinions, and, therefore, the facts are unreported.[19] These denials of certiorari hardly reflect a studied indifference to the media's libel appeals by the Supreme Court. What it does demonstrate is the shallowness of the majority's research and its "waning enthusiasm" hypothesis.

Moreover, recent United States Supreme Court cases do not demonstrate that a retreat is occurring. I have already cited *Milkovich v. Lorain Journal Co.*, where Chief Justice Rehnquist made a detailed summary affirming pre-existing First Amendment law. Certainly, *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. at 688, 109 S. Ct. at 2696, 105 L. Ed. 2d at 589, cannot be deemed a retreat inasmuch as the Court strongly reiterated the reckless disregard standard and its relation to the duty to investigate:

N.C. 577, 403 S.E.2d 522, *cert. denied*, ___ U.S. ___, 112 S. Ct. 190, 116 L. Ed. 2d 151 (1991); *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906, *cert. denied*, ___ U.S. ___, 111 S. Ct. 2261, 114 L. Ed. 2d 713 (1991); *Dale v. Ohio Civil Serv. Employees Ass'n*, 57 Ohio St. 3d 112, 567 N.E.2d 253, *cert. denied, sub nom., Dale v. American Federation of State, County & Mun. Employees, Int'l AFL-CIO*, ___ U.S. ___, 111 S. Ct. 2853, 115 L. Ed. 2d 1021 (1991); *Netzley v. Celebrezze*, 51 Ohio St.3d 89, 554 N.E.2d 1292, *cert. denied*, ___ U.S. ___, 111 S. Ct. 428, 112 L. Ed. 2d 412 (1990); *Villarreal v. Harte-Hanks Communications, Inc.*, 787 S.W.2d 131 (Tex. App. 1990), *cert. denied*, ___U.S. ___, 111 S. Ct. 1316, 113 L. Ed. 2d 249 (1991).

[18] *Barber v. Perdue*, 194 Ga. App. 287, 390 S.E.2d 234, *cert. denied*, ___ U.S. ___, 111 S. Ct. 430, 112 L. Ed. 2d 414 (1990); *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 754, 112 L. Ed. 2d 774 (1991); *Spence v. Flynt*, 816 P.2d 771 (Wyo. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1668, 118 L. Ed. 2d 388 (1992).

[19] *Worldwide Church of God v. McNair*, No. 91-495 (Cal. App., 2d Dist., ___), *cert. denied*, ___ U.S. ___, 112 S. Ct. 380, 116 L. Ed. 2d 331 (1992); *Birsner v. Sivalingham*, No. 91-1382 (Cal. App., 2d Dist., ___), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1671, 118 L. Ed. 2d 391 (1992).

> "A 'reckless disregard' for the truth, however, requires more than a departure from reasonably prudent conduct. 'There must be sufficient evii dence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' *St. Amant* [*v. Thompson*], 390 U.S. at 731 [88 S. Ct. at 1325, 20 L. Ed. 2d at 267]. The standard is a subjective one—there must be sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity.' *Garrison v. Louisiana*, 379 U.S. [64] 74 [85 S. Ct. 209, 216, 13 L. Ed. 2d 125, 133 (1964)]. *As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard. See St. Amant*, [390 U.S.] at 731, 733 [88 S. Ct. at 1326, 20 L. Ed. 2d at 268]. *See also Hunt v. Liberty Lobby*, 720 F.2d 631, 642 (CA 11 1983); *Schultz v. Newsweek, Inc.*, 668 F.2d 911, 918 (CA 6 1982). In a case such as this involving the reporting of a third party's allegations, 'recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.' *St. Amant*, [390 U.S.] at 732 [88 S. Ct. at 1326, 20 L. Ed. 2d at 268]." (Emphasis added).

The majority's misunderstanding of *Harte-Hanks* and the emphasized language is particularly apparent in this case. The majority rests its ultimate conclusions on impermissible standards such as the *Gazette*'s supposed duty to call Attorney Hinerman in advance of publishing the editorial.

Finally, *Masson v. New Yorker Magazine, Inc.*, *supra*, is the Court's latest statement, and it spells out in elaborate detail that falsity cannot be found by minor inaccuracies that do not alter the thrust of the asserted libel.

Had the majority followed these recent United States Supreme Court cases, it would have concluded there was no libel as a matter of law.

B.

Even though I firmly maintain that there was, as a matter of law, no proof of falsity in the *Gazette*'s editorial in light of its privilege to fairly and accurately report official proceedings, I am constrained to express my disagreement with Part IV of the majority opinion.

First, the majority suggests that the *Gazette*'s failure to publish an unequivocal retraction is conclusive proof of malice. This suggestion is simply contrary to established libel law. The general rule is that the presence of actual malice must be determined at the time of the publication of the alleged defamatory statement. *See, e.g., New York Times v. Sullivan, supra*; *Fitzgerald v. Penthouse Int'l. Ltd.*, 691 F.2d 666 (4th Cir. 1982), *cert. denied*, 460 U.S. 1024, 103 S. Ct. 1277, 75 L.Ed.2d 497 (1983); *Peisner v. Detroit Free Press, Inc.*, 104 Mich. App. 59, 304 N.W.2d 814 (1981), *modified on other grounds*, 421 Mich. 125, 364 N.W.2d 600 (1984); *Dupler v. Mansfield Journal Co.*, 64 Ohio St. 2d 116, 413 N.E.2d 1187 (1980), *cert. denied*, 452 U.S. 962, 101 S.Ct. 3111, 69 L.Ed.2d 973 (1981). *See generally*, R. A. Smolla, *Law of Defamation* § 3.22(1) (1990).

The Supreme Court in *New York Times Co. v. Sullivan, supra*, stated that the failure to retract was not alone sufficient to establish malice. The court left open whether the lack of a retraction "may ever constitute such evidence [of malice] . . . ." 376 U.S. at 286, 84 S.Ct. at 729, 11 L.Ed.2d at 710.[20] There are cases where courts have

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[20] The discussion of this issue in *Sullivan*, 376 U.S. at 286-87, 84 S.Ct. at 729, 11 L.Ed.2d at 710, is:

> "Whether or not a failure to retract may ever constitute such evidence, there are two reasons why it does not here. *First*, the

held that under certain circumstances the failure to retract may be relevant proof on the issue of actual malice, *see, e.g., Golden Bear Distrib. Sys. v. Chase Revel, Inc.*, 708 F.2d 944 (5th Cir. 1983); *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991, 193 Cal. Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014, 104 S.Ct. 1260, 79 L.Ed.2d 668 (1984). *See generally* § 580A, comment d, *Restatement (Second) of Torts* (1977).

There is also authority for the proposition that a prompt retraction may be used by a defendant as evidence of lack of actual malice. *See, e.g., Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066 (5th Cir. 1987); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600 (D.D.C. 1977), *aff'd*, 578 F.2d 442 (1978); *Sweaney v. United Loan & Fin. Co.*, 205 Kan. 66, 468 P.2d 124 (1970); *Peisener v. Detroit Free Press, supra*. Moreover, the United States Supreme Court in *New York Times v. Sullivan* reasoned that the refusal of the *Times* to retract as to Mr. Sullivan reflected its reasonable belief that it had not defamed him. *See* footnote 20, *supra*.

Finally, libel law recognizes that a retraction, aside from possible relevance to the malice question, may also be used to mitigate damages. *See, e.g., Sweaney v. United Loan & Fin. Co., supra. See generally* R. Smolla, *Law of Defamation* at § 9.10[9]. The right to have damages mitigated through a retraction is specifically authorized in W. Va.

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letter written by the Times reflected a reasonable doubt on its part as to whether the advertisement could reasonably be taken to refer to respondent at all. *Second*, it was not a final refusal, since it asked for an explanation on this point—a request that respondent chose to ignore. Nor does the retraction upon the demand of the Governor supply the necessary proof. It may be doubted that a failure to retract which is not itself evidence of malice can retroactively become such by virtue of a retraction subsequently made to another party. But in any event that did not happen here, since the explanation given by the Times' Secretary for the distinction drawn between respondent and the Governor was a reasonable one, the good faith of which was not impeached."

Code, 57-2-4 (1923).[21] We have not had occasion to discuss this statute, but clearly it recognizes that an apology will mitigate the plaintiff's damages.

In view of the foregoing law, which the majority has ignored, I find its treatment of the ameliorating effect of a retraction to be erroneous. At the very least, a retraction by a media defendant can be introduced to counter the plaintiff's claim that the publication was made with actual malice or a reckless disregard for its truth. Moreover, where such a good faith retraction is shown, it will mit-

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[21] W. Va. Code, 57-2-4 (1923), states:

> "In any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true, and after notice in writing of his intention to do so (given to the plaintiff at the time of, or for, pleading to such action) may give in evidence in mitigation of damages that he made or offered an apology to the plaintiff for such defamation before the commencement of the action, or as soon afterwards as he had an opportunity of doing so, in case action shall have been commenced before there was an opportunity of making or offering such apology."

As pointed out in R. Smolla, *Law of Defamation* at § 9.12[2][a], many states have enacted retraction statutes, and in footnotes 151 and 152 to this section, these statements are made:

> "[151] Robert Sack has counted 33. R. Sack, *Libel, Slander and Related Problems*, § VIII.2, at 372 (1980). Sack's overview of the various state approaches to retraction is excellent.
>
> "[152] California, for example, follows the majority approach and provides only for certain media defendants in its retraction statute, while Connecticut, Louisiana, Maine, Massachusetts, Nebraska, Texas, and West Virginia apply their statutes to all defendants. *Compare* Cal. Civ. Code § 48a (West 1954), *with* Conn. Gen. Stat. Ann. § 52-237 (West 1960); La. Civ. Code Ann. Art. 2315.1 (West 1979); Me. Rev. Stat. Ann. tit.14 § 153 (1965); Mass. Gen. Laws Ann. ch. 231, § 93 (1956); Mich. Stat. Ann. § 600.2911 (1962); Neb. Rev. Stat. § 25-840.01 (1975); Tex. Rev. Civ. Stat. Ann. art. 5430 (Vernon 1958); W. Va. Code § 57-2-4 (1966)."

igate the damages, and, in my view, insulate a media defendant from a punitive damage award.

C.

Perhaps in recognition of the paucity of the evidence to support his case as a public official, the appellee argues at some length through his cross-assignment of error that he is a private person and, therefore, is not required to meet the rigorous test of *New York Times Co. v. Sullivan*, *supra*. The majority avoids deciding this issue by jumping to its conclusion that the test was met. However, in *obiter dictum*, the majority intimates some misgivings about this conclusion by saying "should a retrial become necessary, this issue will become important." ___ W. Va. at ___, ___ S.E.2d at ___ (Slip op. at 45). It then proceeds to find Mr. Hinerman to be a private figure.

Even if one assumes that attorney Hinerman was a private person, this status would still not support his judgment under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed. 2d 783 (1986). There, the Supreme Court, while recognizing that a private person need not demonstrate that a publication was made with actual malice or reckless disregard of the truth, held that the plaintiff was still required to "bear the burden of showing falsity, as well as fault, before recovering damages." 475 U.S. at 776, 106 S.Ct. at 1563, 89 L.Ed.2d at 792. More recently this rule was acknowledged in *Milkovich v. Lorain Journal Co.*, 497 U.S. at ___, 110 S. Ct. at 2704, 116 L. Ed. 2d at 16, where the Supreme Court reiterated the foregoing statement.

As earlier pointed out, this entire libel rests upon the omission of a single phrase, "until the [fee] bill was paid," in the *Gazette*'s editorial that otherwise accurately set out the facts contained in its news article. There is no question that the news article and the editorial stated Hinerman's attachment took 100 percent of Levin's compensation pay-

ments. Thus, while the attachment existed, Levin did not receive one penny of his compensation award. While lawyers may quibble over how long this period of no payments would last for Mr. Levin, common sense would compel the conclusion that during this period, Mr. Levin received nothing. This was the obvious meaning of the editorial. It was not false in any material regard, and, as a consequence, Mr. Hinerman, even as a private citizen, is not entitled to recover under *Philadelphia Newspapers, Inc. v. Hepps*, *supra*, and its progeny.

IV.

I can only conclude that the significant errors contained in the majority opinion may be rectified in a further appeal to the United States Supreme Court. It is unfortunate that the majority is unwilling to faithfully apply First Amendment law, sworn as we are as judges to uphold the Constitution of the United States. While today's opinion goes against the *Gazette*, it exposes every media organization in this State to its pernicious reasoning. Thus, I echo the words of the seventeenth century poet, John Donne: "Never send to know for whom the bell tolls; it tolls for thee."[22]

I am authorized to state that Justice Brotherton joins me in this dissent.

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[22] *Devotions Upon Emergent Occasions*, "Meditation XVII."

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

Civil Action No. 84-C-137

RAYMOND A. HINERMAN,

Plaintiff,

v.

THE DAILY GAZETTE COMPANY, INC., a corporation d/b/a The Charleston Gazette,

Defendant.

JURY ORDER

This day, October 4, 1990, came the plaintiff, Raymond A. Hinerman, in person and by his counsel, Harry P. Waddell and David M. Hammer. The defendant was represented by its counsel, Rudolph L. diTrapano and Rebecca Beatty.

Thereupon the jury returned into Court in accordance with their adjournment on October 3, and proceeded to hear the Court's charge to the jury, closing arguments on behalf of all parties, and retired to their chamber to consider their verdict. After some time the jury returned into Court, and upon their oaths returned the following verdict: "We, the jury, find for the plaintiff, Raymond A. Hinerman, and against the defendant, The Daily Gazette Company, and assess his damages as follows: A. Compensatory Damages, if any $75,000.00, B. Punitive Damages, if any, $300,000.00, Total $375,000.00. Mrs. Patricia Maloney, Foreperson."

It is therefore ADJUDGED and ORDERED that the plaintiff, Raymond A. Hinerman, recover of and from the

defendant, The Daily Gazette Company, Inc., the sum of $375,000.00, with interest at the rate of ten percent (10%) as of the date of this verdict.

It is further ADJUDGED and ORDERED that the defendant shall pay all courts costs taxed in this proceeding.

ENTER: October 4, 1990

/s/ Larry R. Starcher
JUDGE

STATE OF WEST VIRGINIA:

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 11th day of September, 1992, the following order was made and entered:

Raymond A. Hinerman, Plaintiff Below,
Appellee

vs.) No. 20489

The Daily Gazette Company, Inc., a
corporation, d/b/a The Charleston
Gazette, Defendant Below, Appellant

The Court, having maturely considered the petition for rehearing and reargument filed in the above-captioned case, is of opinion to, and doth hereby, deny the prayer of the petitioner and doth order that the final order entered herein be made absolute and certified as heretofore directed. Chief Justice McHugh deemed himself disqualified and did not participate in the consideration or decision of this case. Justice Caplan, Retired, sat by designation. Justices Brotherton and Miller would grant.

A True Copy

Attest: /s/ Ancil G. Ramey
Clerk, Supreme Court of
Appeals

LEVIN'S CASE WINS APPEAL"

United Press International
May 17, 1983

The West Virginia Supreme Court agreed 5-0 Tuesday to docket an appeal from a Russian-born immigrant whose Workers' Compensation claim was attached to pay his lawyer's fees.

Sam Levin emigrated from Russia to the United States in 1975, and moved to Wheeling two years later to work in the mines. He suffered a heart attack in October, 1977.

His appeal brief said he was being helped in his Workers' Compensation claim by United Mine Workers District 5 Attorney Raymond A. Hinerman, who left his job in January, 1982. Levin kept him as his attorney to pursue his Workers' Compensation claim.

When the legal bill was tendered, Levin, who now lives in Dade County, Florida, failed to pay it. Hinerman won a default judgment of $12,000 against him in Hancock Circuit Court, where Judge Callie Tsapis ordered an attachment of 100 percent of the disability claim to satisfy the judgment, the Court papers said.

"The effect of this ruling is to give to the plaintiff, a practicing attorney, all of the Petitioner's income while the Petitioner, who is totally disabled, has no source of income whatsoever," the appeal said.

"Supreme Court Will Hear Appeal of Client-Lawyer Pay Complaint"

By Mark Paxton
Associated Press Writer
Charleston Daily Mail
May 18, 1983

A Florida man has gained a state Supreme Court hearing of his claim that he was awarded $12,000 in Workers' Compensation benefits only to have his lawyer take the entire amount for handling the case.

The court agreed unanimously Tuesday to hear the appeal by Sam Levin, now living in Miami Beach, Fla.

Levin, who emigrated from the Soviet Union to Israel in 1973 and moved to the United States in 1975, came to West Virginia's Northern Panhandle to work in the coal mines but was disabled by a heart attack, according to court documents.

Levin hired Raymond Hinerman of Hancock County to pursue Workers' Compensation benefits, and in 1982 Levin was awarded $12,088.54, his appeal said. Hinerman filed suit in Hancock County Circuit Court seeking payment from Levin and was permitted to attach his former client's benefit checks, according to the appeal.

Levin's lawyer, David Gold, said that because of that ruling, his client has received no money from the state since the first of the year. And because he is listed as being paid by the Workers' Compensation Fund in West Virginia, he is ineligible to receive unemployment benefits in Florida, Gold said.

The court also agreed unanimously to hear an appeal by the city of Martinsburg and City Manager Eugene Dunworth, who are seeking to overturn a Berkeley County Circuit Court decision awarding $175,000 in damages to a fired city cashier.

Carol V. Mauck was fired in 1976 after city officials accused her of embezzling $10,000 from city coffers. Mrs. Mauck, however, was acquitted of embezzlement charges and sued the city for firing her. A jury awarded Mrs. Mauck $75,000 in compensatory damages and $100,000 in punitive damages.

"The jury really unloaded on you, didn't it?" Justice Sam Harshbarger said to the lawyer representing the city.

"Immigrant appeals lawyer's fees to court"

By Mark Ward
Charleston Gazette
May 18, 1983

A Russian immigrant who was assessed more than $12,000 in legal fees for a one-day hearing on a Workers' Compensation appeal won a review of his case by the state Supreme Court Tuesday.

Sam Levin, a native of the Soviet Union who emigrated to Israel and then to the United States, is appealing a default judgment that Wheeling lawyer Raymond A. Hinerman received against him for the fees.

Hinerman sued Levin for the fees last August and, after Levin neglected to answer the suit, received permission from Ohio County Circuit Judge Callie Tsapis to take 100 percent of Levin's monthly Workers' Compensation benefits until his fees are paid.

Lawyer David Gold told the high court Tuesday that the fees appear to be excessive and said he was appalled that Levin, who is now staying with friends and family in Miami Beach, Fla. and has no source of income, is compelled to deliver his benefit checks to Hinerman.

Levin emigrated from the Soviet Union to Israel in 1973, then traveled to the United States in 1975, the appeal petition states. He first came to Massachusetts, but because he was trained as a coal miner in the Soviet Union, decided to move to Wheeling where he got a job with Consolidated Coal Co. in April 1977.

In October 1977 he suffered a heart attack and was unable to work.

According to the petition, Hinerman, a former staff counsel for United Mine Workers District 6, represented Levin in the Workers' Compensation claim for free at first as a benefit of union membership.

However, Levin was granted only 20 percent disability. Hinerman, meanwhile, quit the Union but convinced Levin to retain him as a private attorney to bring the appeal. After a one-day hearing, the petition states, Levin was granted permanent total disability.

Last July Hinerman sent Levin a bill for $4,201.88 for representing him in the hearing. When Levin neglected to pay, Hinerman brought suit against Levin, Consolidation Coal Co., Employment Services Corp. and Workers' Compensation Commissioner Gretchen Lewis for $12,088.54.

In November, Levin wrote a letter to Judge Tsapis, saying that he could not afford to hire a lawyer, but felt that he owed Hinerman nothing. "I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage," he wrote.

Hinerman asked for a default judgment against Levin, and Judge Tsapis, ruling that Levin's request did not comply with court rules, approved it. The judge also ruled that Hinerman could attach 100 percent of Levin's Workers' Compensation benefits until the bill was paid.

The petition also noted that Hinerman stated in a hearing that when Levin was flown from Florida for the appeal hearing that "the costs in this case, to try to save Mr. Levin money, were charged to another client. . . . So he probably saved a good $1,000 in costs."

The petition asked that Levin be given an opportunity to defend himself, saying, "An immigrant who must have all correspondence translated, who is in ill health, living on the charity of friends an family and ignorant of the legal process should be excused his neglect in not timely answering (the) complaint."

In other action the court:

• Granted 5-0 an appeal by Twila Virginia Blake of Huntington, who is seeking the right to visit a 5-year-old

grandson she had been taking care of before she divorced her husband.

Mrs. Blake and Thomas E. Blake were awarded custody of the boy, who was born out of wedlock, after their daughter, the child's mother, ran away from home. When the Blakes were divorced in August 1980 the child was assigned to live with the grandfather.

• Refused 4-1 to prohibit the trial of Stan Kenton Massie who said he had amnesia when he allegedly shot Ralph E. Cornwell Aug. 21, 1982.

• Refused an appeal by Samuel Matthews who was convicted of unlawful assault against his 3-year-old daughter.

"Lawyer ethics"

Charleston Gazette
May 20, 1983

The State Bar ethics committee which guards against lawyer misconduct—and also the Judiciary Inquiry Commission which watches over judges—should keep an eye on a current state Supreme Court case.

It involves a sick immigrant miner who won disability payments, but his lawyer took every penny, getting $12,000 for one day's work. (The lawyer said the old man was lucky because $1,000 of the miner's legal expense was billed to a different client.) A judge allowed it to happen because a letter from the immigrant didn't meet proper legal form.

Allegations before the high court:

Sam Levin, a Russia native, moved to Wheeling and worked for Consolidation Coal Co. until he suffered a heart attack. UMW attorney Ray Hinerman, paid by the union, represented Levin free before the Workers' Compensation Fund. The miner was granted 20 percent disability.

Hinerman quit the UMW and represented Levin privately in an appeal. After a one-day hearing, Levin was granted 100 percent disability. Hinerman sent the ex-miner a bill for $4,202. Levin didn't pay. The lawyer sued in Hancock County Circuit Court, demanding $12,088.

Levin wrote a letter to Judge Callie Tsapis saying he couldn't afford to hire another lawyer to answer the suit, but felt he owed Hinerman nothing. "I am convinced that Mr. Hinerman used my ignorance and lack of skill in language and law to his advantage." Ms. Tsapis ruled that the letter didn't constitute a legal reply. She gave Hinerman a default judgment and allowed him to seize 100 percent of Levin's Workers' Compensation benefits.

A different lawyer came to Levin's aid and appealed to the Supreme Court. The petition says Hinerman, incredibly, testified that he did the old miner a favor by billing $1,000 worth of Levin's expenses to another client.

The case hasn't been decided, but it implies that another helpless client has suffered at the hands of a lawyer. The legal ethics committee should monitor the case closely. Unfortunately, the committee usually won't act unless an official complaint is filed in proper legal form—and then the committee focuses on tedious technicalities rather than basic morality, right and wrong.

As for Judge Tsapis, nothing she might do would be surprising. She once hosted a party at which crooked lawyers under prison sentence or indictment were hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still, the commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 92-984

In The

Supreme Court of the United States

October Term, 1992

THE DAILY GAZETTE COMPANY, INC.,

Petitioner,

v.

RAYMOND A. HINERMAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER CERTIORARI SHOULD BE DENIED SINCE THE STANDARD OF PROOF FOR FALSITY IS NOT AN ISSUE PROPERLY BEFORE THIS COURT.

II. WHETHER CERTIORARI SHOULD BE DENIED SINCE THIS IS NOT A PROPER CASE IN WHICH TO ELABORATE ON THE STANDARD OF PROOF FOR FALSITY BECAUSE THERE IS NO DISPUTE AS TO "FALSITY" IN THE ORDINARY SENSE. THE PARTIES' ACTUAL DISPUTE IS OVER THE MEANING OF THE EDITORIAL RATHER THAN THE UNDERLYING FACTS OF THE CASE.

III. WHETHER CERTIORARI SHOULD BE DENIED WHERE THE LOWER COURT CONDUCTED AN INDEPENDENT REVIEW ON THE FALSITY ISSUE.

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STATEMENT OF THE CASE

A. Facts

The Respondent, Raymond Hinerman ("Hinerman") finds the statement of the case offered by The Daily Gazette Company, Inc. ("The Gazette") inadequate, particularly with regard to the actual events in question, as distinct from news reports of them. A supplemental statement of facts appears below.

This action arises out of an editorial regarding a fee dispute between Mr. Hinerman and Sam Levin ("Levin"). Mr. Hinerman successfully represented Levin in a workers' compensation claim in West Virginia. Mr. Hinerman had originally represented Levin in his capacity as the attorney retained by Levin's union; when Mr. Hinerman resigned from his position as union counsel, his successor recommended to Mr. Levin that Levin retain Mr. Hinerman privately to complete the claim. The parties entered into a standard contingent fee agreement providing that Mr. Hinerman would receive 20% of all compensation awarded Mr. Levin for a maximum of 208 weeks, the maximum permitted under West Virginia statute.

In the appellate proceedings on the workers' compensation dispute, Mr. Levin was awarded permanent total disability, entitling him to future benefits of $1,162.38 per month for life, and a lump sum for accrued benefits of $19,782.38.

Mr. Levin had initially authorized Mr. Hinerman to receive his portion of the fee directly from the workers' compensation commissioner as the benefits were paid

out. Mr. Levin secretly notified the workers' compensation commissioner that he was revoking the authorization to pay the fee directly to Mr. Hinerman, but never notified Mr. Hinerman of that fact and, indeed, kept him ignorant of the change in authorization. When Mr. Hinerman found out about the secret revocation of the authorization, he demanded payment directly from Levin. After repeated demands for payment failed, Mr. Hinerman brought suit in West Virginia circuit court for the fees due.

Mr. Levin failed to make a proper response to the complaint, and a default judgment was entered. Levin was given 10 days in which to present a bona fide defense, and a detailed evidentiary hearing was held with respect to the facts of the case and the ability of Levin to present a bona fide defense. At the conclusion of the hearing, at which Levin was represented by an attorney, the West Virginia circuit court affirmed the default judgment order. The order provided that Mr. Hinerman was entitled immediately to 20% of all workers' compensation payments already paid to Mr. Levin and that 100% of Mr. Levin's periodic payments were to go to Mr. Hinerman until that amount was satisfied. Thereafter, Mr. Hinerman was to receive 20% of the periodic payments, until the maximum total of 208 weeks' worth of an award had been received. The 20% contingent fee applied to only 208 weeks of an award that would last for Levin's lifetime. At trial the evidence was that the lifetime value of the award exceeded $300,000. Thus, the actual percentage of the total award taken under the contingent fee agreement would be approximately 4%.

Levin appealed the foregoing order by Judge Tsapis (the "Tsapis Order") to the West Virginia Supreme Court. The petition for appeal filed by Levin's attorney (the "Levin petition") was the catalyst for some news articles and the editorial that is the basis for this defamation action. Although Mr. Hinerman never conceded that any of the articles were accurate, he elected to litigate only with respect to the editorial published by the Gazette.

In all material respects, the Supreme Court of Appeals of West Virginia upheld the Tsapis' order, in a published decision: *Hinerman v. Levin*, 172 W. Va. 777, 310 S.E.2d 843 (1983). In particular, the court expressly found the contingent fee agreement enforceable and proper.

Although the Levin petition did not present a balanced recitation of the factual background, it expressly revealed that the Tsapis order had awarded Hinerman only the permitted contingent fee and that the 100% levy on the monthly proceeds would continue only until the amount in arrears (due on the prior $19,000 lump sum award and intervening monthly payments) had been cleared.

The Gazette's editorial, which is given in full in the appendix to the petition for certiorari, made no mention of the actual portion of the compensation award received by Mr. Hinerman, but instead stated that the petition "involves a sick immigrant miner who won disability payments, but his lawyer took every penny. . . . " App. at 85a. The editorial also repeated a previously published charge against Judge Tsapis, and stated:

> [S]he once hosted a party at which crooked lawyers under prison sentence or indictment were

> hailed as heroes. The Judicial Inquiry Commission found nothing wrong with her conduct then. Still, the Commission should ask why she allowed a lawyer to take all the public money granted to an impoverished ex-miner too sick to work.

App. at 86a.

The editorial was written by James Haught, a senior assistant to the publisher of the Gazette. Mr. Haught was personally acquainted with Mr. Hinerman, had relied upon him as a source in earlier stories regarding corruption in Mr. Hinerman's area of West Virginia, and knew that Mr. Hinerman had no connection to the corrupt lawyers referred to in the editorial's statements mentioning Judge Tsapis. Mr. Haught stated at trial that he personally considered Mr. Hinerman truthful. Mr. Haught further testified that he was sufficiently "surprised" by the allegations against Mr. Hinerman to send a reporter to "double-check" the accuracy of the allegations. He did not, however, make any effort to check with Mr. Hinerman before publishing the editorial.

B. The Opinions Below

The full text of the opinion of the West Virginia Supreme Court, written by Justice Neeley, and the text of the dissenting opinion by Justice Miller, are found in the appendix to the petition for certiorari. The opinion of the court expressly acknowledges the duty of the court to "make an independent evaluation of the facts to determine whether the jury's verdict was correct and liability can be imposed upon a media defendant." App. at 30a-31a. The court quoted this Court's statement that a

reviewing court must "examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." *Id.* (quoting *New York Times Co.*, 376 U.S. at 385). The court held:

> We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew *that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false*, or that Mr. Haught published the editorial with a subjective appreciation that, *at least*, he was recklessly disregarding the truth.
>
> App. at 34a (initial emphasis added, emphasis in original as to "at least").

With respect to the primary defenses raised by the Gazette, the opinions of both the majority and the dissenting justices were in substantial agreement. The opinion of the court noted that the "*Gazette's* most important argument on appeal is that even though its editorial was both false and defamatory, the *Gazette* enjoyed two privileges that make the paper immune from liability." App. at 33a. The court noted that the first privilege asserted was that of fair comment, and the second was "the privilege to report official proceedings or public meetings." App. at 33a-34. The dissent noted that "the controlling issue in the case [is] whether the *Gazette* is privileged against a libel suit because of its right to fairly and accurately report on official proceedings." App. at 49a. Despite near agreement on the issues, the majority opinion and dissenting opinion reached different conclusions on the fair

comment question. The majority opinion's analysis is summarized in the following paragraph:

> Although we recognize the privilege of fair comment and the privilege to report official proceedings, we do not accept the Gazette's argument that it may shuffle the two privileges to create an editorial that is primarily a recitation of alleged facts where the reader is led to believe that the editorial writer believes the reported unsubstantiated facts, which are indeed untruths or half-truths. A regular news account that sets forth pleadings – notwithstanding that they are entirely one-sided – gives at least some notice to the reader that unsubstantiated allegations are being reported. Similarly, an article appearing on the editorial page that is derogatory, derisive or generally abusive, without alleging or implying any supporting facts, gives fair warning that the article is simply the editorial writer's opinion. However, when unsubstantiated allegations are so combined with strongly partisan opinion that the reader is led to believe that the editorial writer has access to undisclosed defamatory facts that lead him to believe the allegations he is reporting from a court proceeding are correct, the bounds of permissible behavior are overstepped.

App. at 34a.

In addition to the issues raised by the Gazette's appeal, both the majority and the dissenting opinions discussed the cross-appeal of Mr. Hinerman, challenging the trial court's ruling that he was a public official. The majority's analysis occupies four pages of the appendix

(44a-48a), and is concluded by the holding that Mr. Hinerman was not a public official, because his positions did not rise to that level, and because the Gazette's editorial made no mention of those positions. In conclusion, the opinion for the court stated: "Consequently, should this case be retried, we hold that it must be retried under the negligence standard that applies to the libel of a private individual." App. at 48a. The dissent rejected this conclusion. App. at 74a.

SUMMARY OF ARGUMENT

Petitioner, asks this Court to grant certiorari to resolve interrelated questions regarding the burden of proof imposed by the First Amendment as to the falsity element of a defamation action. The petition should be denied for the following reasons:

1. The Gazette failed to present an argument regarding the proper standard of proof for falsity before the West Virginia Supreme Court and the court, accordingly, did not pass upon this issue.

2. The Gazette incorrectly assumes that Hinerman is a public official for the purposes of its petition. However, the West Virginia Supreme Court of Appeals specifically held that Hinerman is a private figure to which the heightened protections of *New York Times v. Sullivan*, 376 U.S. 254 (1964) would not apply. This holding is not challenged by the Gazette in its petition is, accordingly, waived.

3. Had the issue of the proper standard of proof for falsity not been waived, this case would not allow any meaningful clarification on that point. There is no dispute with regard to truth or falsity in a meaningful sense, and the Gazette's references to falsity as an issue are misleading. The dispute in this case concerns the "meaning", "gist", or "sting" of the statements published by the Gazette. Thus, even if this Court determined that clarification was required on the burden of proof for falsity in libel cases, this case does not present an appropriate vehicle for such a clarification.

4. This case is an inappropriate one for certiorari because the Gazette is clearly wrong in its claim that the West Virginia Supreme Court of Appeals failed to conduct a constitutionally required independent review. The West Virginia Supreme Court decision evidences that the court did, in fact, conduct just such an independent review.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED SINCE THE STANDARD OF PROOF FOR FALSITY IS NOT AN ISSUE PROPERLY BEFORE THIS COURT.

A. The Gazette Waived, Before The West Virginia Supreme Court, Any Argument As To The Proper Standard Of Proof For Falsity

It is a well-settled rule that this Court will not consider arguments "not pressed or passed upon below." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 217 (1990). *See also Youakim v. Miller*, 425 U.S. 231 (1976) (per curiam); *Clark v.*

Jeter, 486 U.S. 456, 459 (1988) (holding, upon review of the record, that party did not "adequately present" pre-emption claim to state court).

Contrary to the claim in its petition, the Gazette failed to present any argument regarding the proper standard of proof as to falsity to the Supreme Court of Appeals of West Virginia. Furthermore, the decision of the West Virginia Supreme Court did not "pass upon" or address in any fashion this "issue".

The Gazette's petition cites two portions of its brief to the West Virginia Supreme Court purportedly raising the issue of the burden of proof. Petition at 6, n.5. The first citation is to footnote 3 of the appellate brief, the full text of which is as follows:

> The United States Supreme Court increasingly has described the element of substantial falsity as an essential component of actual malice, e.g., *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991) (June 20, 1991) (even manufacturer [sic] quotations representing "deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposed [sic] of *New York Times Co. v. Sullivan* . . . unless the alteration results in a material change in the meaning conveyed by the statement." Slip opinion at 13.
>
> Petitioner submits that the issue of substantial falsity cannot be divorced from the broader question of actual malice, and that both elements should be judged by a "clear and convincing" evidence standard.

In this passage, there is but a single sentence which relates to the issue of the burden of proof, and it contains not the slightest supporting argument.

The second citation in the Gazette's petition refers to pages 33-42 of its appellate brief. These pages comprise a section of the brief entitled "The Factual Assertions in the Editorial Are Substantially True." This section of the brief consists almost entirely of an extended discussion of the facts of the case. The section is entirely devoid of reference to the proper standard of proof for falsity.

The decision of the West Virginia Supreme Court is wholly without any reference[1] to the proper burden of proof for falsity, and it is obvious from the court's silence that it did not consider the question to have been adequately raised or argued by the Gazette.[2] The question simply was not passed on by that court, nor did the Gazette "press" the issue.

The rule in West Virginia is that an assignment of error that is not briefed or argued is waived. *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374, 379 (1981). This Court has long held that it will not address questions deemed waived by state courts under their procedural rules. *Beck v. Washington*, 369 U.S. 541, 553 (1962) (holding that single sentence in brief to Washington Supreme

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[1] The reply brief of Mr. Hinerman before the West Virginia court is, of course, utterly silent on the supposed issue of what the correct burden of proof is regarding falsity.

[2] Indeed, it is worth noting that even the dissenting justices made no mention of the arguments now being raised in this Court. Even the dissenters perceived no issue as having been raised on the burden of proof issue.

Court would be considered a waiver of the point by that court; hence, under "unbroken line of precedent" Supreme Court could not entertain question) (citing cases). There is, therefore, no basis on which to reach the burden of proof issue the Gazette attempts to raise in its petition.

B. Imposing On A Private Figure Plaintiff The Higher Burden Sought By The Gazette Would Require Overruling *Gertz*, Which Is Not An Argument Made In The Petition

The Gazette contends that a heightened standard of proof, such as that applicable to the actual malice determination required by *New York Times v. Sullivan*, should be applied to proof of falsity. However, since Mr. Hinerman was held by the West Virginia Supreme Court to be a private individual, there is no basis for the imposition of a heightened constitutional standard as required in cases where the plaintiff is a public official or public figure.

This Court has continually recognized the important distinctions between public and private individuals who have been injured by defamatory falsehoods. Public figures enjoy far greater access to the channels of effective communication and have a better chance to counter defamatory remarks than private individuals. *Gertz v. Robert Welch*, 418 U.S. 323 (1974). This Court has recognized that private figures are more vulnerable to the ill effects of defamation, and that there is a greater state interest in protecting them. Given the inherent differences between public and private defamation plaintiffs, the Court has constructed different standards of liability

for the defamation of public and private individuals. *Gertz*, 418 U.S. 323.

Although the underlying case was tried on a public official theory, Mr. Hinerman cross-appealed the trial court's ruling that he was a public official. The West Virginia Supreme Court of Appeals reversed the trial court determination and held that Hinerman was not a public official or public figure, and that, in any retrial, the case should be tried on a negligence theory. App. at 44a.[3]

In its petition, the Gazette did not request review of the West Virginia court's holding as to Mr. Hinerman's status as a private figure. Rule 14.1(a) of the Rules of this Court clearly provides that "[o]nly questions set forth in the petition, or fairly included therein, will be considered by the Court." Because the Gazette has failed to contest this holding in its petition, the Court may not properly consider the issue. *Yee v. City of Escondido, California*, 60 U.S.L.W. 4301 (1992); *Berkemer v. McCarty*, 468 U.S. 420 (1984).

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[3] The court stated:
Finally, the plaintiff cross-assigns error to the circuit court's determination that by virtue of his position as an appointed municipal judge, his membership on the West Virginia Racing Commission, and his membership on the Board of Governors of West Virginia State Bar, the plaintiff is a "public official." Although resolution of this issue is not necessary for our decision in this appeal, should a retrial become necessary, a resolution of this issue will be important. Consequently, we hold that under applicable First Amendment principles, Mr. Hinerman is not a public official or public figure for the purposes of this defamation action.

The Gazette asks this Court to consider whether the First Amendment requires falsity to be established by the same clear and convincing evidence standard applicable to the actual malice standard of *New York Times*. The Gazette's argument assumes, incorrectly, that Hinerman is to be considered a public official for the purposes of its argument.

As noted above, in *Gertz* this Court recognized that private individuals are more vulnerable to injury and more deserving of recovery than public officials and public figures. Therefore, the Court concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." *Gertz*, 418 U.S. at 345-346. The Court went on to hold that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347.

The Gazette has not asked this Court to reconsider the *Gertz* decision, nor has it argued that more exacting standards need to be applied to private figures such as Mr. Hinerman. The Gazette has made no effort to brief or argue the question of whether the such heightened standards should be applied to private figures on the facts of this case. It would be improper for this Court to take up this question absent proper development in the courts below. These issues were neither briefed nor argued below, and are not ripe for review by this Court. *Springfield v. Kibbe*, 480 U.S. 257 (1987).

II. THIS IS NOT A PROPER CASE IN WHICH TO ELABORATE ON THE STANDARD OF PROOF FOR FALSITY BECAUSE THERE IS NO DISPUTE AS TO "FALSITY" IN THE ORDINARY SENSE. THE PARTIES' ACTUAL DISPUTE IS OVER THE MEANING OF THE EDITORIAL RATHER THAN THE UNDERLYING FACTS.

Libel cases where there exist disputed issues as to truth or falsity of alleged defamatory statements typically involve disputes as to the actual state of the underlying facts. An example of this type of dispute is illustrated by *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989). In that case, the parties hotly disputed whether the substance of the statements at issue were true. The plaintiff in *Harte-Hanks* had been accused of offering favors to grand jury witnesses in order to procure charges against a staff member of the plaintiff's political opponent. There was a direct contradiction between two grand jury witnesses as to whether any blandishments had been offered by the plaintiff. It was in this context that this Court noted "some debate as to whether the element of falsity must be established by clear and convincing evidence." *Id.* at 661, n. 2.

In the present case, there is no dispute as to the state of facts against which the Gazette's editorial should be measured. One may search the Gazette's petition in vain for any analysis of disputed underlying facts against which to measure the truth of the editorial. The actual substance of the Gazette's position is summarized in two statements: "a publication such as the editorial at issue in this case, *which conveyed an essentially truthful message*, is

not actionable as a matter of federal constitutional law"; and "[there] must be some falsity that 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.' "[4] Petition at 12-13 (*quoting Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419, 2433 (emphasis added). As in *Masson*, the primary dispute was over the meaning of the statements and their effect on the reader. On this issue, there is no need for clarification by this Court.

Whether a defamatory statement is sufficiently far from the truth to support a constitutionally permissible judgment has traditionally been analyzed by this Court as part of the "actual malice" determination – *i.e.*, determining whether the publication could have been made in reckless disregard of truth or falsity. *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (holding that the magazine's recounting of

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[4] The Gazette also relies heavily upon the opinion of the dissenting justices who, the Gazette claims, were the only ones to undertake "independent appellate review." Petition at 11. The Gazette's petition sets forth its position on the falsity question by quoting the following passage from the dissent:

> There is no question that the news article and the editorial stated Hinerman's attachment took 100 percent of Levin's compensation payments. Thus, while the attachment existed, Levin did not receive one penny of his compensation award. While lawyers may quibble over how long this period of no payments would last for Mr. Levin, common sense would compel the conclusion that during this period, Mr. Levin received nothing. *This was the obvious meaning of the editorial.* It was not false in any material regard, and, as a *consequence*, Mr. Hinerman, even as a private citizen, is not entitled to recover. . . .

Petition at 8, quoting App. 74a-75a (emphasis added).

an official report, and failure to note that parts of the report were taken from allegations on a civil complaint, not sufficient to support actual malice finding); *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991) (discussing whether six statements falsely attributed as direct quotations of plaintiff, varied sufficiently from quote of actual statements to raise a jury question).

Masson, a case relied upon heavily by the Gazette in its petition, is instructive of the proper analysis. There two types of "falsity" were at issue. The corporate defendants, the *New Yorker Magazine*, and a publishing company, had both published an article that was highly uncomplimentary to the plaintiff, Masson. The article contained numerous quotations from the plaintiff, some of which were not contained in taped interviews. The plaintiff claimed that certain of the quoted statements had never been made. The defendants asserted that the statements had been made or, alternatively, that the published statements were sufficiently close in meaning to actual statements to bar any recovery.

The first type of falsity determination involved a straightforward factual question of whether the statements had been made. There was no dispute among the parties that a genuine issue of fact existed as to that matter. The defendants nevertheless obtained summary judgment in their favor, based upon the finding of the lower court that the statements were "substantially true," even if not actually made. *Id.* This second analysis of "falsity" – judging whether the meaning of the statements varied sufficiently from the facts – was reviewed by the

Court *de novo* under the traditional *New York Times* standard of "actual malice," which is reckless disregard for truth or falsity.

> The constitutional question we must consider here is whether, in the framework of a summary judgment motion, the evidence suffices to show that respondents acted with the requisite knowledge of falsity or reckless disregard as to truth or falsity. This inquiry in turn requires us to consider the concept of falsity; for we cannot discuss the standards for knowledge or reckless disregard without some understanding of the acts required for liability. We must consider whether the requisite falsity inheres in the attribution of words to the petitioner which he did not speak.
>
> . . . . .
>
> We must determine whether the published passages differ materially in meaning from the tape recorded statements so as to create an issue of fact for a jury as to falsity.

Id. at 2431, 2435.

As the foregoing passage illustrates, this Court has clearly held that a finding of reckless disregard of truth or falsity requires an assessment of the meaning of a statement, and that an assessment of a statement's meaning is a necessary, but preliminary, step in determining whether a *question* of falsity exists.[5]

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[5] The West Virginia Supreme Court in fact made such an assessment and found, clearly and convincingly that the variance between the editorial's statements and the undisputed facts were great enough to show reckless disregard of the truth.

This type of assessment of falsity which depends on determining a statement's meaning must already be reviewed by appellate courts *de novo*, under the *New York Times* clear and convincing standard. This is merely part of the well-recognized duty of an appellate court "to be sure that the speech in question actually falls within the unprotected category." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984). There is, therefore, no unresolved question on "falsity" in this sense that would require granting certiorari.

Falsity of the first type – factual falsity – is the only type of falsity as to which there is a split in the circuits. The two cases noted by this Court[6] as evidencing a divergence of opinion both involved factual falsity. *See Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir.) *cert. denied*, 409 U.S. 875 (1972) (factual dispute as to whether wife had persuaded private detective to leave employment of firm retained by husband) and *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir.) *cert. denied*, 396 U.S. 1049 (1970) (factual dispute as to whether Senator suffered from paranoia).

In the present case there is no dispute regarding the underlying facts of the Hinerman/Levin lawsuit. Both parties to the present action are in total agreement as to the contents of the Tsapis order, the contents of the Levin petition to the West Virginia Supreme Court, and the pertinent actions of Mr. Hinerman. The Gazette's reference to a falsity issue is misleading to the Court, because there is no dispute as to the underlying facts.

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[6] *Harte-Hanks*, 105 L.Ed. 2d at 573, n. 2.

III. CERTIORARI SHOULD BE DENIED WHERE THE LOWER COURT CONDUCTED AN INDEPENDENT REVIEW ON THE FALSITY ISSUE.

The Gazette claims that the West Virginia Supreme Court of Appeals made no independent review as required by constitutional law. As previously discussed, the only disputed questions relating to falsity in this case concerned the *meaning* of the editorial. The West Virginia Supreme Court extensively discussed the facts of the case, App. at 10a-19a, and the court's decision is replete with excerpts from the trial transcript in support of its holding. The decision itself clearly evidences that an independent analysis and review actually did take place.

> We have independently reviewed the factual record and conclude that the jury was correct in determining that there was clear and convincing evidence that the writer of the editorial, Mr. Haught, at the time the editorial was written, either knew *that the impression of dishonesty and unethical conduct that the editorial intentionally conveyed was false,* or that Mr. Haught published the editorial with a subjective appreciation that, *at least,* he was recklessly disregarding the truth.

App. 31a (initial emphasis added; emphasis in original is to the phrase "at least").

After the foregoing passage, the court's opinion then summarized, in the next one and one-half pages, the evidence that the article was published with knowledge of, or reckless disregard, for its truth or falsity.

Furthermore, the West Virginia court explicitly stated that a reviewing court is obligated to make an independent

review to determine whether liability could properly be imposed. App. at 30a, *citing Harte-Hanks*, 491 U.S. 657 and *New York Times*, 376 U.S. 254. In fact, the court quoted extensively from the *Harte-Hanks* decision, including the portion of the opinion stating that "the reviewing Court must " 'examine for [itself] the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." ' " App. at 31a, *quoting New York Times Co.*, 376 U.S. at 285 (quoting *Pennekamp v. Florida*, 328 U.S. 331 (1946)). The Gazette's claim that there was no independent review is never supported in the petition by anything other than an assertion that the state court's decision was wrong and, therefore, the court could not have conducted any independent review. This unsupported assertion is belied by even a casual review of the decision.

CONCLUSION

The Gazette's petition raises an issue which was not preserved before the West Virginia Supreme Court of Appeals, ignores the implications of the West Virginia court's holding with regard to the public official/private figure issue and attempts to manufacture constitutional issues requiring this Court's review where none exist.

Therefore, based upon the foregoing, Respondent Raymond A. Hinerman respectfully requests that the Gazette's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 27 1993
OFFICE OF THE CLERK

No. 92-984

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1992

THE DAILY GAZETTE COMPANY, INC.,
Petitioner,

v.

RAYMOND A. HINERMAN,
Respondent.

On Petition For a Writ of Certiorari
To the Supreme Court of Appeals
Of West Virginia

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

The Daily Gazette Company respectfully submits this reply to the brief in opposition filed by respondent Raymond A. Hinerman.

ARGUMENT

I. OF COURSE THE GAZETTE DOES NOT SEEK TO OVERTURN GERTZ: THE NEW YORK TIMES ACTUAL MALICE STANDARD APPLIES IN THIS CASE BECAUSE RESPONDENT SOUGHT AND WAS AWARDED PUNITIVE DAMAGES.

In an effort to avoid review, respondent claims that application of the actual malice standard on these facts would require the Court to overrule its decision in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Opp'n at 11-13.

This, of course, is pure fiction: The Gazette is *relying on* Gertz, not seeking to overturn it. Gertz requires even a private figure plaintiff to meet the "demanding standard" of New York Times if he seeks punitive damages. 418 U.S. at 350. As The Gazette noted in its petition, the

actual malice standard applies because respondent sought and received an award of punitive damages. Pet. at 7 n.7, 15.[1/]

That the New York Times standard applies not only in public official and public figure libel cases,

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1/ The actual malice standard also applies because respondent was a public official at the time of publication. Review of the opinion of the Neely majority confirms that the suggestion that respondent was not a public official is pure dictum. See Pet. App. at 21a ("we will assume for the purposes of reviewing the lower court's judgment that Mr. Hinerman was a public official"); id. at 44a ("resolution of [the public official] issue is not necessary for our decision in this appeal").

Viewed in context, the majority's gratuitous discussion of this issue is best understood as an effort to insulate the novel reasoning of the majority opinion from the impact of Supreme Court review, a possibility recognized by both the three-justice majority and the two dissenting justices. Id. at 44a, 75a.

but also in any private figure case in which punitive damages are sought, underscores the frequency with which the issues addressed in The Gazette's petition arise.[2/]

II. THE GAZETTE PROPERLY URGED APPLICATION OF THE CLEAR AND CONVINCING EVIDENCE STANDARD BOTH IN THE TRIAL COURT AND IN THE WEST VIRGINIA SUPREME COURT.

Respondent also attempts to evade review by asserting, without support in law or the record, that The Gazette did not properly preserve its argument that in an "actual malice"

2/ Another case currently before this Court on a petition for certiorari illustrates that the important issues raised in The Gazette's petition arise in a wide variety of circumstances and have been subject to a wide variety of judicial responses. See Rouch v. Enquirer and News of Battle Creek, Michigan, petition for cert. filed, 61 U.S.L.W. 3420 (U.S. Nov. 23, 1992) (No. 92-895).

libel case, the plaintiff must establish falsity by clear and convincing evidence. Opp'n at 8-11. To reach this conclusion, respondent is forced to postulate that the West Virginia Supreme Court would adopt a remarkable rule requiring a litigant intending to raise an argument for the Court's consideration to write some undisclosed minimum number of sentences (or paragraphs or pages?). Accordingly, he argues that The Gazette waived its argument that falsity must be proved by clear and convincing evidence while *actually quoting a passage from The Gazette's brief* in which it urged the West Virginia Supreme Court to apply the clear and convincing evidence standard in

reviewing the record for evidence of falsity. Id. at 9.

Respondent fails to identify any West Virginia decision specifying the number of sentences or paragraphs or pages that must be written before an error is considered properly raised.[3/]

The Gazette properly asked the trial court to instruct the jury that falsity must be established by clear and convincing evidence (R. 148, 173-77), objected to the court's instruction that a preponderance of the evidence would suffice (R. 243-44), and, in seeking independent appellate review, urged the West Virginia Supreme

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3/ Addair v. Bryant, the only case cited by respondent, stands only for the unremarkable proposition that an error may be deemed waived if it is neither briefed nor argued. 168 W. Va. 306, 284 S.E.2d 374, 383 (1981).

Court to review the record for clear and convincing evidence of falsity (Appellant's Brief at 19-20 n.3.). Since respondent has been unable to identify any West Virginia decision finding an argument waived on such facts, this Court's holding in Beck v. Washington, 369 U.S. 541 (1962), is inapplicable.

Moreover, even if this error had not been properly raised below, this Court's rules still would allow for review of the burden of proof of falsity as a subsidiary question fairly included within the broader question of whether an appellate court hearing an "actual malice" libel case must conduct an independent review to ensure that the plaintiff has met his constitutional burden of proving

falsity. See Sup. Ct. R. 14.1(a). The Court cannot engage in the independent review suggested by New York Times without deciding on the evidentiary standard by which falsity must be established.

III. THE WEST VIRGINIA SUPREME COURT DID NOT INDEPENDENTLY REVIEW THE RECORD FOR CLEAR AND CONVINCING EVIDENCE OF FALSITY.

In a final effort to escape review by this Court, respondent makes the wholly unsupported assertion that the West Virginia Supreme Court did in fact conduct an independent appellate review of falsity.[4/] Opp'n at 19-20.

4/ Apparently recognizing that the West Virginia Supreme Court did not independently review the record for clear and convincing evidence of falsity, respondent argues in the alternative that this Court should deny certiorari because this case does not

(continued...)

Unable to identify any

portion of the opinion below in which

4/ (...continued)
involve the right kind of falsity. Opp'n at 14-18. There is, of course, no support in the decisions, of this or any other court for respondent's contention that as a matter of constitutional law there are at least two classes of falsity subject to different constitutional analyses. Whether under the facts of a given libel case the dispute focuses on what the plaintiff did or on what the defendant said, the question of falsity ultimately turns on whether there is sufficient discrepancy between what the plaintiff actually did and what the defendant said about what the plaintiff did to permit an award of damages. That this question is *not* merely subsumed within the actual malice analysis has been clear since this Court decided New York Times v. Sullivan, 376 U.S. 254, 289 (1964) ("The ruling that these discrepancies between what was true and what was asserted were sufficient to injure respondent's reputation may itself raise constitutional problems . . ."). See also Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) (holding that even "a private-figure plaintiff must bear the burden of showing that the speech at issue is false before recovering damages for defamation from a media defendant").

the majority engaged in any analysis of falsity[5/], respondent supposes that since the court should have independently reviewed the record for evidence of falsity, it must have done so. See Opp'n at 19-20.

Respondent attempts to give this position the illusion of substance by pointing to language in the opinion below discussing the court's obligation to conduct an independent review of the actual malice issue. Id. at 19. But the majority opinion contains no analysis of falsity. The majority's independent review of actual malice, from which respondent divines an

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5/ Respondent's assertion that "[t]he West Virginia Supreme Court made such an assessment" is unsupported by any citation to that court's opinion. See Opp'n at 17 n.5.

analysis of falsity, addresses only questions of knowledge and reckless disregard. Pet. App. at 31a-33a. The West Virginia Supreme Court implicitly adopted the jury finding of falsity without analysis, despite the fact that the jurors were improperly instructed that the plaintiff in an "actual malice" libel case need only prove falsity by a preponderance of the evidence.

CONCLUSION

As explained in detail in The Gazette's opening brief, this Court should take this opportunity to resolve the pronounced split in lower court authority over whether the First Amendment requires independent appellate review in "actual malice" libel cases to ensure that falsity has

been proved by clear and convincing evidence.

Respectfully Submitted,

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